CASE NO. 16-2297 [Consolidated with 16-3162 and 16-3271]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Petitioner, No. 16-2297 v. NATIONAL LABOR RELATIONS BOARD, Respondent, and HOBBY LOBBY STORES, INC., Intervening Respondent.	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745
HOBBY LOBBY STORES, INC., Petitioner, No. 16-3162 v. COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Intervening Respondent, and NATIONAL LABOR RELATIONS BOARD, Respondent.	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745

NATIONAL LABOR RELATIONS BOARD, Petitioner, No. 16-3271 v. HOBBY LOBBY STORES, INC., Respondent, and COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Intervening Petitioner,	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745

APPEAL OF DECISION OF NATIONAL LABOR RELATIONS BOARD
363 NLRB No. 195, 20-CA-139745

OPENING BRIEF OF PETITIONER AND INTERVENING RESPONDENT AND INTERVENING PETITIONER, COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-2297

Short Caption: The Committee to Preserve the Religious Right to Organize v. National Labor Relations Board

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I. JURISDICTION STATEMENT

Case 16-2297 is a Petition for Review filed pursuant to 29 U.S.C. § 160(f). The Petitioner, the Committee to Preserve the Religious Right to Organize ("Committee") is a person aggrieved. The aggrievement status of the Petitioner has already been resolved by this Court in a prior order.

The agency decision involved in these cases is *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (May 18, 2016).

Case 16-3162 is a Petition for Review filed by Hobby Lobby Stores, Inc. ("Hobby Lobby"), which was initially filed in the Fifth Circuit and transferred to this Court pursuant to 28 U.S.C. § 2112. Hobby Lobby is a person aggrieved in this Court which also has jurisdiction over that Petition for Review under 29 U.S.C. § 160(f).

Case 16-3271 is a Petition for Enforcement filed by the National Labor Relations Board ("Board" or "NLRB"). This Court has jurisdiction pursuant to 29 U.S.C. § 160(e).

There are no time limits for the filing of petitions for review or petitions for enforcement.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Federal Arbitration Act ("FAA") applies to this arbitration procedure where there is no showing that there is a contract that affects interstate commerce or a transaction or dispute that affects interstate commerce?

2. Whether the arbitration procedure is unlawful under the National Labor Relations Act ("NLRA") as applied to the truck drivers employed by Hobby Lobby, who are indisputably exempt from coverage by the FAA?

3. Whether an arbitration procedure that prohibits class actions is invalid because there are other provisions within the arbitration agreement or the

company policies that interfere with NLRA § 7, 29 U.S.C. § 157 rights to effectively use the arbitration procedure?

4. Whether an arbitration procedure is invalid under the NLRA because it would prohibit collective actions that are not preempted by the FAA under applicable state law?

5. Whether an arbitration procedure is invalid because it would prohibit group claims that are not class actions, representative actions or other procedural devices available in court or other *fora* and thus the FAA is not applicable?

6. Whether an arbitration procedure is invalid because it would require employees to resolve disputes through the arbitration procedure rather than through protected concerted activities such as boycotts, strikes and protected, concerted activity?

7. Whether an arbitration procedure is invalid because it interferes with Section 7 claims by foreclosing group claims brought by a union as the representative of the employees?

8. Whether an arbitration procedure that imposes additional costs on employees to bring employment-related disputes is invalid under Section 7 of the National Labor Relations Act?

9. Whether an arbitration procedure is invalid under Section 7 of the National Labor Relations Act because it would prohibit an employee of another employer from assisting a Hobby Lobby employee or joining with a Hobby Lobby employee to bring a claim?

10. Whether an arbitration procedure is invalid because it applies to parties who are not the employer?

11. Whether an arbitration procedure is unlawful because it interferes with the Section 7 rights of employee to act concertedly together to defend claims by the employer against them?

12. Whether the Board improperly prohibited the Committee from presenting evidence to an Administrative Law Judge rather than submitting this on a stipulated record?

13. Whether the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 ("RFRA") requires that the Board find that the arbitration procedure is invalid under Section 7 because employees have a core religious right of helping other workers?

14. Whether the remedy is adequate?

III. STATEMENT OF THE CASE

This is a Petition for Review from a Decision and Order issued by the National Labor Relations Board on May 18, 2016. (App. 5.) The Board issued its Decision after an Administrative Law Judge ("ALJ") had issued her Decision on September 8, 2015, finding the employer's policies at issue to be unlawful under the NLRA.

The Committee had filed an unfair labor practice charge against Hobby Lobby on October 28, 2014, and a Complaint issued and thereafter an Amended Complaint on April 9, 2015.

On June 2, 2015, the General Counsel of the Board and Hobby Lobby filed a "Joint Motion to Submit a Stipulated Record to the Administrative Law Judge." (J.A. 1–3.) The Committee objected to the submission on a Stipulated Record, but the ALJ issued an order granting the Joint Motion over the Committee's objection.

After the submission of the Joint Motion and the Stipulated Record, the ALJ issued her Decision, and both the Committee and Hobby Lobby filed Exceptions to the Board which issued its Decision on May 18, 2016, finding the policies at issue to be unlawful under the NLRA.

IV. SUMMARY OF ARGUMENT

Hobby Lobby maintained the Mutual Arbitration Agreement ("MAA")[1], which prohibits various forms of collective and group actions in arbitration or in courts. Under this Court's decision in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), even assuming the FAA applies, the provision violates the NLRA, 29 U.S.C. § 158(a)(1).

The FAA does not apply in this case because there is no evidence that any transaction or controversy arising out of that transaction affects interstate commerce. Because there is no such evidence, the FAA cannot be applied and there is inadequate Commerce Clause jurisdiction. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956).

The MAA has inherent provisions that render it ineffective for employees acting concertedly. For example, it provides for confidentiality, which violates the NLRA and thus renders the MAA itself unlawful on that ground.

The employer maintains many other employment policies, all of which interfere with the protected, concerted activity of employees and therefore violate Section 7 of the NLRA. Because these other policies interfere with or hinder the exercise of rights to use the MAA, the MAA is unlawful. In addition to the confidentiality provisions, there are provisions that limit the use of company email which could be used by employees to gather evidence or seek assistance from other employees in using the MAA.

The MAA is also invalid on a number of other statutory grounds. For example, it preempts employees from going to various federal and state agencies seeking relief that would extend beyond them or serve an important public purpose.

[1] Throughout the NLRB proceedings, the Committee referred to this as a Forced Unilateral Arbitration Procedure. It is not voluntary nor is it mutual. We use Hobby Lobby's misleading nomenclature in this Brief. References to the MAA are to the "Mutual Arbitration Agreement." Where we use the abbreviation "MAA," the Court should read it as "Mandatory Arbitration Agreement."

The MAA is unlawful because it would restrict employees from exercising their rights under state law, where that state law is not preempted by the Federal Arbitration Act. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). The MAA also would prohibit group actions such as boycotting or picketing because the exclusive remedy to resolve disputes is through the MAA and employees can be disciplined for violation of company policy, including the MAA.

Finally, the Board has failed to address the application of the Religious Freedom Restoration Act, which would protect the right of employees to engage in mutual assistance, which is a core religious right.

V. ARGUMENT

A. INTRODUCTION

The issue in this case as to whether the FAA overrides the principles of the NLRA as applied to the MAA has been settled by this Court in *Epic Systems Corp.*, 823 F.3d 1147. There is a split among the Circuits as to whether the FAA governs the MAA. Without detailing all the courts that have ruled on this issue, the Board has sought *certiorari* in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *and petition for cert. filed* (No. 16-307). However, *Epic Systems Corp.* does not govern the Commerce Clause and FAA issue because *Epic Systems Corp*. involved claims brought in Federal Court under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. We first argue below that the FAA does not apply.

The Committee presents additional arguments that render the arbitration procedure unlawful under the NLRA, even if the FAA is deemed to govern. Moreover if the FAA does not apply, then this Court must reexamine *Epic Systems Corp.* to determine whether the NLRA prohibits such waivers. Although the answer to that question is necessarily that it does, the Court will have to reconsider its view. Primarily, as the Committee argues below, the FAA cannot apply to this

dispute because there is no showing that the possible transactions or the contract involved affect interstate commerce. The Committee raises numerous other issues, which are detailed in the brief below.[2]

B. STANDARD OF REVIEW

The Court is authorized to set aside, in whole or in part, the Board's Decision and Order. The Court should uphold on appeal decisions of the NLRB only if its findings of fact are supported by substantial evidence and if the Board correctly applied the law. *See Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 918 (9th Cir. 2006); *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003); *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 307 (9th Cir. 1996). "When the Board's findings lack such support [of 'substantial evidence'] in the record, the reviewing courts must set them aside, along with the orders of the Board that rest on those findings." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 782 (1979).

The Court only needs to defer to the Board's interpretation of the NLRA if it is rational and consistent with the NLRA. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994). "Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption … of major policy decisions properly made by Congress.'" *NLRB v. Fin. Inst. Employees, Local 1182*, 475 U.S. 192, 202 (1986) (quoting *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

The Board's choice of remedy is subject to an abuse of discretion standard. *NLRB v. Transp. Serv. Co.*, 973 F.2d 562, 566–67 (7th Cir. 1992).

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[2] The Committee recognizes that, to some degree, these issues are premature because they could be raised as issues in the Intervenor's brief or reply brief. They are raised here to ensure that there is no waiver of these issues and because they will fundamentally affect the outcome of this case. Furthermore, the Board declined to consider these arguments. (*See* App. 5 n.2.) We are not sure of the breadth of that statement, as to whether it includes the FAA and RFRA issues or other issues. We will address that in a Reply Brief if raised by Hobby Lobby or the Board.

"[Where the] facts below are not contested; we examine only the Board's legal conclusions to determine whether they are irrational or inconsistent with the Act. Our review is also constrained by the analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Gen. Serv. Employees Union, Local No. 73 v. NLRB*, 230 F.3d 909, 912 (7th Cir. 2000) (citation omitted).

Additionally, courts do not defer to the Board's interpretation of law outside the NLRA. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202–03 (1991); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have … never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.").

C. THE FAA DOES NOT APPLY

1. Introduction

The Board has never addressed the question of whether the FAA applies to an arbitration procedure without constitutional concerns raised by the Commerce Clause. Nor has the Board addressed the issue of whether the FAA applies to most employment controversies. We address those issues below.[3]

The provision of the FAA at issue is Section 2, 9 U.S.C. § 2: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable … ."

[3] The ALJ correctly found that the FAA did not apply. The Board ignored the issue, and relied on *Murphy Oil USA, Inc.*, 361 NLRB No. 72, to invalidate the arbitration provision. These arguments were made in *SJK, Inc.*, 364 NLRB No. 29 (2016), *FAA Concord H, Inc.*, 363 NLRB No. 136 (2016), and *Tarlton & Son, Inc.*, 363 NLRB No. 175 (2016).

First, assuming there was a contract evidencing a transaction, there is no showing that such a contract affects commerce. Second, assuming an employment dispute (controversy) is an activity, there is no showing that such future controversy affects commerce. Third, there is no showing that the dispute resolution activity of arbitration affects commerce. Here, Hobby Lobby cannot establish any constitutional or statutory basis to apply the FAA to override the NLRA

There is no inconsistency in the regulation of activity encompassed within the NLRA and finding a lack of commerce activity regulated by the FAA. The NLRA regulates the employer and its effect on commerce; the activity regulated is activity of employees and employers and labor organizations. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224 (1963). In contrast, the FAA regulates only a targeted activity: a controversy to be settled by arbitration. The FAA does not purport to apply to employees, unions or employers and their "concerted activities for … mutual aid or protection." 29 U.S.C § 157. It does not regulate the effect on commerce of the employer's activity. Thus, there is no inconsistency. Here, the Commerce Clause issue is squarely placed. The commerce finding by the Board was only a legal conclusion that Hobby Lobby as an employer was engaged in commerce based on its gross revenues. (J.A. 40 ¶2(b).) That allegation is a minimal commerce allegation. There is no allegation that such revenues had anything to do with any employment dispute. With that bare commerce finding, we proceed to analyze whether the FAA can apply.

This Court must address this constitutional issue, which the Board has avoided, where Hobby Lobby will rely on the FAA for its core argument. Either the FAA applies or it doesn't.

2. The FAA Does Not Apply Since There Is No Contract Evidencing a Transaction Involving Interstate Commerce

By its own terms, the FAA applies only to arbitration provisions that appear in a "contract evidencing a transaction involving commerce" (9 U.S.C. § 2), where commerce is defined as "commerce among the several States or with foreign nations" (9 U.S.C. § 1).

There is no contract in the record other than the arbitration agreement. Hobby Lobby claims that the employment relationship is not a contract of employment other than the arbitration procedure.[4] Hobby Lobby maintains: "This Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status."

By its terms, the arbitration procedure is a contract limited to only dispute resolution. Thus, there is no contract evidencing a transaction other than the arbitration procedure. The FAA cannot be applied.

Assuming, however, that the employment relationship is deemed a contract, Hobby Lobby must show that such transaction affects commerce.

The Supreme Court has held that, under this language, "the transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 277 (1995).

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[4] The MAA "is made in consideration for the continued at-will employment of Employee, the benefits and compensation provided by Company to Employee and Employee's and Company's mutual agreement to arbitrate as provided in this Agreement." (J.A. 108, 168.) The first sentence states the employment at will nature of the employment relationship. This agreement contract is an illusory one because it is terminable at will. The Hobby Lobby Associate Handbook expressly disclaims the existence of "any kind of 'employment contract,' since, with the exception of the at-will and arbitration agreements, which are binding agreements, the Company has the ability to [change] working conditions as it deems appropriate … ." Further, in bold print the Handbook states it "is not a contract, express or implied, guaranteeing employment for any specific duration." (J.A. 58, 117.) Nor has Hobby Lobby established that a contract of employment exists in each of the states in which the agreement would apply.

Thus, the FAA cannot be applied unless there is proof that the contract containing the arbitration provision evidences a transaction that affects interstate commerce. *Garrison v. Palmas Del Mar Homeowners Ass'n,* 538 F.Supp.2d 468, 473 (D.P.R. 2008) ("[T]he FAA … only applies when the parties allege and prove that the transaction at issue involved interstate commerce.") (citing *Medina Betancourt et al. v. La Cruz Azul*, 155 D.P.R. 735, 742–43 (2001)); *Shearson Hayden Stone, Inc. v. Liang,* 493 F.Supp. 104, 106 (N.D. Ill. 1980), *aff'd*, 653 F.2d 310 (7th Cir. 1981) ("Interstate commerce is a necessary basis for application of the [FAA].").

In *Bernhardt v. Polygraphic Co. of America*, the Supreme Court found that the FAA did not apply to an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of the company's lithograph plant in Vermont. The Court found that the contract did not "evidence 'a transaction involving commerce' within the meaning of section 2 of the Act" because there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce." *Bernhardt*, 350 U.S. at 200–01.

Similarly, in *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157MHP, 2007 WL 2255221 (N.D.Cal. Aug. 3, 2007), the court found that an "employment contract [did] not involve interstate commerce as required by the [FAA]" where an employee "was employed at a single location," "[h]is employment did not require interstate travel," and "his activities while employed with defendants as well as the events at issue in the underlying suit were confined to California." *Id.* at *3. *See also Ambulance Billing Sys. v. Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex.App. 2003) (holding FAA not applicable where services performed were confined to Texas).

There is no evidence that the employment transaction between the parties here involves interstate commerce. Employees who perform work in only one state are not engaged in activity that affects interstate commerce. Here, the Board's jurisdictional finding is devoid of facts. It is simply that "Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act."[5] (App. 10.) There is no other evidence of interstate commerce. Although Hobby Lobby maintains retail stores nationwide (J.A. 24), disputes that arise between any of its employees and Hobby Lobby may be simple, local disputes governed only by state law, like one missed meal period or rest break. Cal. Lab. Code § 227.3. Some disputes might not even be economic, but simply claims seeking to resolve personality issues or shift assignments or workplace duties between employees. Whether this kind of local dispute is submitted to individual or group arbitration in its final stages will not make any difference for interstate commerce. Yet the arbitration procedure purports to govern all activity, no matter how trivial or local. Such a private arbitration agreement with an individual who does not perform work across state lines, does not transport goods across state lines, and is not seeking to enforce anything other than state law is not a contract evidencing a transaction involving interstate commerce.

The character of Hobby Lobby's retail business does not alter this conclusion. The relevant question here is whether the transaction between the parties has an effect on interstate commerce. The fact that one of the parties to the transaction is independently involved in interstate commerce for other purposes does not bring every contract that party enters, no matter how trivial or local, within the reach of the FAA. Even though Polygraphic Co. was an employer that engaged in interstate commerce and operated lithograph plants in multiple states, the Supreme Court

[5] The Committee did not join in the stipulated facts, including the commerce facts. Nonetheless, it agrees for purposes of the NLRA that Hobby Lobby is engaged in commerce.

still determined that the arbitration agreement in the employment contract between Polygraphic Co. and Bernhardt did not involve interstate commerce. *Bernhardt*, 350 U.S. at 200–01. Even though Hobby Lobby is engaged in the retail business that may impact interstate commerce, an arbitration agreement between Hobby Lobby and an individual employee who does not perform work across state lines is still an agreement about how to resolve generally local disputes that does not involve interstate commerce. As the court observed in *Slaughter*, "[t]he existence of national companies … does not undermine the conclusion that the activity is confined to local markets. Techniques of modern finance may result in conglomerations of businesses …. [but] the reaches of the Commerce Clause are not defined by the accidents of ownership." *Slaughter*, 2007 WL 2255221, at *7.

Similarly, even if Hobby Lobby operates nationally, it does not transform the local nature of the employment relationship since those retail activities are not part of the arbitration agreement but are merely incidental to employment transaction. They are not subject to the arbitration procedure. *See Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) ("The facts that the nursing home buys supplies from out-of-state vendors … are insufficient to impress interstate commerce regulation upon the admission contract for residential care between the Oklahoma nursing home and the Oklahoma resident patient."); *Saneii v. Robards*, 289 F.Supp.2d 855, 858–59 (W.D. Ky. 2003) (finding the sale of residential real estate to an out-of-state purchaser had "no substantial or direct connection to interstate commerce," since any movements across state lines were "not part of the transaction itself" but merely "incidental to the real estate transaction"); *City of Cut Bank v. Tom Patrick Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998) (concluding that construction contract was a local transaction, not involving interstate commerce, despite purchase of insurance and materials from out-of-state).

Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003), does not change the analysis. In that case, the Supreme Court held that the FAA could be applied in cases where there was no showing that the individual transaction had a specific effect upon interstate commerce, so long as "in the aggregate the economic activity in question would represent 'a general practice … subject to federal control'" and "that general practice need bear on interstate commerce in a substantial way." *Id.* at 56–57 (citations omitted). Under this standard, the Court found that the application of the FAA to certain debt-restructuring contracts was justified given the "broad impact of commercial lending on the national economy" and the facts that the restructured debt was secured by inventory assembled from out-of-state parts and that it was used to engage in interstate business. *Id.* at 57–58. As other courts have observed, the logic used by the *Alafabco* court to justify the application of the FAA to a large financial transaction between a bank and a multistate manufacturer is not readily applicable to a private arbitration agreement covering claims that a local employment contract has been breached. *Slaughter*, 2007 WL 2255221, at *4 (distinguishing the "debt-restructuring contracts involving a manufacturer" at issue in *Alafabco* from a contract "for service type employment that occurred solely within the state"); *see also Bridas Sociedad Anonima Petrolera Indus. y Comercial v. Int'l Standard Elec. Corp.*, 490 N.Y.S.2d 711, 716 n.3 (Sup.Ct. 1985) (contrasting "an agreement based upon a multimillion dollar transfer of stock between an American and Argentine corporation" and the simple allegation of breach of an employment contract at issue in *Bernhardt*). Private arbitration agreements with employees who do not perform work across state lines, do not transport goods across state lines, and are not seeking to enforce anything other than state law are not contracts that involve interstate commerce in the way major debt-restructuring contracts did in *Alafabco*.

The FAA cannot be stretched so far as to apply to any employment controversy between an individual and her employer just because the employer is, for other purposes, engaged in interstate commerce. Such a reading of the FAA would contravene *Bernhardt* and raise serious constitutional concerns. Moreover, it would render meaningless the language in the statute limiting it to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy … ." 9 U.S.C. § 2.

3. This Case Is Beyond the Constitutional Reach of the FAA Since There Is No Showing That the Activity of Resolving Those Controversies Through Arbitration Affects Interstate Commerce

Under the Commerce Clause, Congress may only regulate "'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2578 (2012) (quoting *United States v. Morrison,* 529 U.S. 598, 609 (2000)). Because the FAA was enacted pursuant to the Commerce Clause (*Perry v. Thomas*, 482 U.S. 483, 490 (1987)), it cannot constitutionally be applied here unless the regulated activity has this connection to interstate commerce.

The fact that the employer in this case is independently engaged in interstate commerce for other purposes cannot supply the necessary connection to commerce, because the FAA is not a regulation of Hobby Lobby or Hobby Lobby's business. In *Sebelius*, the Supreme Court made it clear that Congress may only use its authority under the Commerce Clause "to regulate 'class[es] of *activities*,' … not classes of *individuals*, apart from any activity in which they are engaged." *Sebelius*, 132 S.Ct. at 2590 (first alteration in original) (citation omitted). Thus, in determining whether a regulation is permissible under the Commerce Clause, the court must not look at the class of individuals affected by the law, but at the actual activities that are being targeted by the law. Following this analysis, the Court ruled that the

individual mandate could not be characterized as a regulation of individuals who would eventually consume healthcare, because that is just a class of individuals and not the actual activity regulated by the ACA. *Id.* at 2590–91. Similarly here, the FAA cannot be characterized as a regulation of employers engaged in interstate commerce, because that is just a class of corporate individuals and not the actual activity regulated by the FAA.

The actual activity regulated by the FAA is the resolution of disputes between private parties. The FAA does not seek to regulate how the employer conducts its business or carries out its commercial activities. The FAA does not purport to regulate any activity other than the narrow aspect of dispute resolution in arbitration. This is the actual activity Congress sought to regulate in the FAA, and such a law passed pursuant to the Commerce Clause cannot be constitutionally applied to the dispute resolution activity here unless this activity is connected to interstate commerce. *See Sebelius*, 132 S.Ct. at 2578.

The activity of resolving disputes between private individuals is not a "channel[] of interstate commerce," it is not a "person[] or thing[] in interstate commerce," and whether the disputes covered by the arbitration procedure here are resolved in individual or group arbitration does not "substantially affect interstate commerce." *Sebelius*, 132 S.Ct. at 2578 (quoting *Morrison*, 529 U.S. at 609). Many of the disputes covered by the arbitration procedure do not implicate interstate commerce or have any substantial effect on interstate commerce. The arbitration procedure is drafted in a way that would extend to any employment dispute. It could encompass a claim for one hour's pay, one missed meal period or rest break, or any other claim that has no impact whatsoever on interstate commerce. It would encompass a claim that was not economic at all, but just an effort to resolve personality issues or shift assignments or workplace duties. If two employees had a "conflict" that was not economic and asked for joint collective arbitration, that

dispute would not have any impact on interstate commerce. All non-economic disputes that would have no impact on commerce are covered. Such local disputes governed by state contract law or state labor law lack any substantial connection to interstate commerce. If the dispute does not affect interstate commerce, regulation of the resolution of the dispute is not within the scope of the Commerce Clause, and the FAA cannot constitutionally apply. Whether a dispute between Hobby Lobby and any of its employees is ultimately resolved in individual or group arbitration does not have an impact on any issue of interstate commerce. Because the employer has not shown that the disputes covered by the arbitration procedure would affect interstate commerce or that the activity of resolving those disputes in individual or group arbitration would affect interstate commerce, the FAA cannot constitutionally be applied here.

Even though the FAA cannot constitutionally target the dispute resolution activity here, the NLRA can constitutionally regulate labor dispute resolution activity between employers and their employees. This is not anomalous. The NLRA was passed pursuant to explicit Congressional findings that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce … ." 29 U.S.C. § 151. The Supreme Court has explained that Section 7 of the NLRA embodies the effort of Congress to remedy this problem. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) ("[I]t is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). The NLRA can thus reach dispute resolution as a necessary part of its regulation of the employment relationship, designed to address the inequality in

bargaining power that burdens interstate commerce. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 37 (1937) (recognizing that regulation of local, intrastate activity is permissible as a necessary part of a larger regulatory scheme). Unlike the NLRA, the FAA is not a larger regulation of employment and does not seek to change the fundamental ways employers and workers relate to each other in order to confront the labor strife that impedes interstate commerce. It seeks to regulate the private dispute resolution activity of individuals apart from its content or context, and this is impermissible.

Congress may not focus on the intrastate dispute resolution activities of private individuals apart from a larger regulation of economic activity. *See United States v. Lopez*, 514 U.S. 549, 558 (1995) ("'[T]he Court [has not] declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.' Rather, 'the Court has said only that where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'" (first alteration in original) (citation omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)). The Supreme Court has said that regulation of intrastate activity is permissible where it is one of the "essential part[s] of a larger regulation of economic activity" and the "regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The relevant statutory regime here is the FAA. By its terms, the FAA addresses only individual transactions. 9 U.S.C. § 2 (applying the terms of the act to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce"). Therefore, the regulatory scheme does not encompass wide sectors of economic activity in a general fashion but rather applies to individual transactions or contracts. Regulation of a local dispute that does not itself have any effect on interstate commerce is not a necessary part of the

regulatory scheme. Similarly, failure to enforce arbitration provisions in purely intrastate contracts would not subvert the entire statutory scheme in the same way as the failure to regulate purely intrastate marijuana production would undercut regulation of interstate marijuana trafficking. *Gonzales v. Raich*, 545 U.S. 1, 26 (2005). Because regulation of the intrastate activity here is "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," it "cannot … be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. As a result, there are no constitutional grounds for applying the FAA to intrastate dispute resolution activity that bears only a trivial effect or no effect on interstate commerce. *Bernhardt*, 350 U.S. 198.

4. <u>There is No Controversy Actual or Potential That Affects Commerce</u>

Finally there is no evidence any potential controversies affect commerce. No evidence was offered as to the impact of any potential claims upon commerce. As to the maintenance of the arbitration procedure, it applies "to any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute) that Employee may have … ." (J.A. 108, 168.) This would include disputes over schedules, work assignments, vacation schedules, training, abuse or harassment by supervisors, missing pay, or any insignificant dispute which would have no impact whatsoever on commerce.

The FAA applies to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … ." 9 U.S.C. § 2. No employee other than those involved in the two dismissed actions has asserted any claim. No other employee has asserted any

claim because the arbitration procedure is not an effective means of resolving individual claims. The FAA is only triggered by its terms when there is a "controversy." None exists here except the two dismissed actions, which are no longer controversies. (J.A. 194–225.) The absence of any such claim proves the chilling effect of the arbitration procedure. No claim exists precisely because the arbitration procedure is illegal. Like any unlawful employer maintained rule, the rule effectively chills employees' rights and thus serves its intended purpose. Until a concrete controversy that demonstrably affects commerce develops, the FAA cannot be applied.

5. Summary

In summary, the FAA does not apply.

D. THE FAA DOES NOT APPLY TO THE TRUCKDRIVERS

The ALJ also correctly found that the FAA does not apply to truck drivers. (*See* App. 17.) Hobby Lobby employs truck drivers who transport goods in interstate commerce. *See* Hobby Lobby Team Drivers Job Application, *at* http://www.drivehobbylobby.com/. (*See* J.A. 12 ¶4(b).)

The FAA exempts from its application drivers who are involved in interstate commerce, meaning interstate transportation of goods. *See* 9 U.S.C. § 1; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (discussing transportation exemption).[6] The Board ignored that issue. It is not necessary to reach the Commerce Clause issue as to those employees who are statutorily excluded from the FAA. Since this is a pure statutory issue beyond the expertise of the Board, this Court should find that the arbitration procedure is unlawful as to truck drivers.

[6] *See also Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at *6 (N.D.Cal. Apr. 5, 2004), *modified on recons.*, No. 03-01180 (SBA), 2005 WL 1048699 (N.D.Cal. May 4, 2005).

E. THERE ARE ADDITIONAL REASONS NOT ADDRESSED BY THE BOARD WHY THE FAA CANNOT OVERRIDE THE NLRA

1. There Are Other Federal Statutes That Allow Employees To Seek Relief In a Group or Representative Fashion

The Board failed to address the question of whether the FAA may override the application of the NLRA as to other federal statutes that allow whistle-blowing or independent administrative remedies. As the Board correctly found in *Murphy Oil USA, Inc.*, there are important purposes underpinning Section 7 that are not addressed by the FAA. That equally applies to claims that employees can make under other federal statutes regarding workplace issues. The arbitration procedure provision effectively undermines those other federal statutes. Thus, the MAA interferes with other federal statutory schemes, which envision and, in some cases, require remedies that will affect a group. The Board was forcefully reminded by the Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), that it must respect other federal enactments.[7] Here, the Board failed to recognize that there are many federal statutes that allow group, collective or class claims or even individual claims that affect a group. The FAA cannot be used to defeat the purposes of those statutes.

Employees have the right to bring to various federal agencies many types of issues that affect them and other workers. Under these statutes, they have the right to seek relief from those agencies for their own benefit as well as for the benefit of other workers or employees of the employer. Those remedies can involve government investigations, injunctive relief, federal court actions by those agencies, debarment from federal contracts, workplace monitoring and many other remedies that would be collective and concerted in nature.

[7] The assertion by Hobby Lobby that the FAA overrides the NLRA is another example of this principle.

In effect, the arbitration procedure would prohibit an employee from invoking, on his/her behalf as well as on behalf of other employees, protections of these various federal statutes. It would prohibit the agency or the court from remedying violations of the law that the agency or court would be empowered, if not required, to remedy.

The Congressional Research Service has identified forty different federal laws that contain anti-retaliation and whistleblower protection. *See* Jon O. Shimabukuro et al., *Survey of Federal Whistleblower and Anti-Retaliation Laws*, Cong. Research Serv. Report No. R43045 (April 22, 2013), *available at* http://fas.org/sgp/crs/misc/R43045.pdf. These are all laws that relate directly to workplace issues. Nothing in the FAA preempts the application of other federal laws. A few examples are mentioned below.

The federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*., allows for the District Courts to grant injunctive relief to "restrain violations of [the Act]." *See* 29 U.S.C. § 217.[8] The application of the arbitration procedure would prevent an individual or a group of individuals from seeking injunctive relief that would apply to all employees or apply in the future to themselves and other employees.[9]

The same is true with respect to ERISA, 29 U.S.C. § 1001, *et seq*. The MAA extends to "all Disputes under … the Employee Retirement Income Security Act … ." (J.A. 108, 168.) The arbitration procedure would prohibit an employee from

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[8] It is not contradictory to refer to the rights under federal statutes and raise the question of commerce jurisdiction with respect to the FAA. The difference is that the FAA regulates dispute resolution or the employment dispute, not the commerce activity of the employer. There would be, in most cases, federal court jurisdiction over the FLSA claim, but that would not mean that the FAA would also apply based on the same FLSA constitutional commerce standard.

[9] Even a claim by an employee that she was not paid for overtime after forty hours, as required by the FLSA, would not affect commerce if the claim was based on the promise in the handbook to pay overtime. The pursuit of that claim for a few dollars of overtime would not affect commerce for FAA purposes.

going to court with respect to a claim involving a benefit covered by ERISA, even though the statute expressly allows for equitable relief. 29 U.S.C. § 1132(a)(1) and (3).

The arbitration procedure would prevent employees from bringing a complaint to the Occupational Safety and Health Administration seeking investigation and correction of worksite problems affecting all employees where action after the investigation would be necessary.

The MAA would prevent an employee from filing an EEOC charge that could lead to EEOC court action seeking systemic or class wide relief. It would prevent the employees from participating in systemic charge investigations. 42 U.S.C. § 2000e-8(a). Commissioners may file charges on their own (42 U.S.C. § 2000e-5(b)), which the MAA would prohibit.

The arbitration procedure would prevent employees from bringing unlawful immigration practices to the attention of the Office of Special Counsel. U.S. Dep't of Justice, *Office of Special Counsel for Immigration-Related Unfair Employment Practices*, *available at* http://www.justice.gov/crt/about/osc/.

It would prohibit anonymous actions. *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

The arbitration procedure would prohibit actions under the federal False Claims Act. U.S. Dep't of Justice, *The False Claims Act: A Primer*, *available at* http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf. For example, an employee could not claim that, on a federal Davis-Bacon project, the employer made false claims for payment while not paying the prevailing wage. An employee could not claim, along with others, that the employer is overcharging on a government contract. *See United States ex rel. Wall v. Circle C Constr., L.L.C.*, 697 F.3d 345 (6th Cir. 2012). This kind of litigation serves an important public purpose but would be foreclosed by the arbitration

procedure. This kind of claim is necessarily brought as a group action, since the relief sought includes a remedy for the underpayment of a group of workers.

The arbitration procedure would prohibit an employee from bringing a claim to the Department of Labor that Hobby Lobby violates the provisions of the Fair Labor Standards Act regarding employment of minors.

The arbitration procedure, by its terms, undermines the enforcement of these federal statutes, which envision private efforts to enforce their purposes for all employees and for the public interest.

There are a multitude of federal laws that govern the workplace. The arbitration procedure prohibits an employee acting collectively or to benefit others from seeking assistance before those agencies and in court to effectuate the purposes of those statutes. Hobby Lobby could discipline an employee who violates this policy. The arbitration procedure would prohibit the employee from doing so for the benefit of employees acting collectively. The purposes of those statutes would include not only individual relief for the employee himself or herself, but also relief that would protect the public interest in enforcement of those statutes.

For these reasons, the arbitration procedure itself is invalid, because it would prohibit an employee from seeking concerted relief with respect to other federal statutes and because it would prohibit employees from seeking relief that would benefit other employees. The FAA cannot serve to interfere with the enforcement of other federal statutes.

2. The Arbitration Agreement Prohibits Representative Actions That Are Not Preempted by the FAA under State Law

The California Supreme Court has ruled that an arbitration agreement cannot foreclose application of the Private Attorney General Act, California Labor Code §§ 2699 and 2699.3. *See Iskanian v. CLS Transp.*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S.Ct. 1155 (2015). *See also Sakkab*, 803 F.3d 425.

There are numerous other provisions in the California Labor Code that permit concerted action. *See, e.g.*, *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), *cert. denied*, 134 S.Ct. 2724 (2014) (holding that arbitration policy cannot categorically prohibit a worker from taking claims to Labor Commissioner, although state law is also preempted from categorically allowing all claims to proceed before the Labor Commissioner in the face of an arbitration policy).

The MAA would interfere with the substantive right of the California Labor Commissioner to enforce the wage provisions of the Labor Code. *See, e.g.*, Cal. Lab. Code § 217.

There are, additionally, various provisions in the California Labor Code that allow only the Labor Commissioner to award penalties or grant other relief. The enforcement of the MAA would prevent employees from collectively going to the Labor Commissioner seeking these penalties for themselves or other employees. It would foreclose an employee from asking the Labor Commissioner to seek remedies for a group of employees. *See, e.g.*, Cal. Lab. Code § 210(b) (allowing only the Labor Commissioner to impose specified penalties); Cal. Lab. Code § 218 (authority of district attorney to bring action); Cal. Lab. Code § 225.5(b) (penalty recovered by Labor Commissioner); IWC Order 16, Section 18(A)(3). *See also* Cal. Lab. Code §§ 245–249 (sick pay law enforceable by Labor Commissioner). Employees could not collectively seek enforcement of these remedies because the MAA prohibits them from bringing claims collectively to that agency. The Labor Commissioner could not participate in any arbitration procedure since the MAA states that the "Employee and the Company [are] the only parties to the arbitration." (J.A. 108, 168.) It would prevent other public officers from enforcing state law for a class or group upon complaint by employees. *See* Cal. Bus. & Prof. Code § 17204.

Additionally, under state law, there are a number of whistleblower statutes. The MAA would prohibit employees from invoking those statutes for relief that

would affect them as well as others. The California Labor Commissioner lists more than thirty-three separate statutes that contain anti-retaliation procedures. *See* Cal. Dep't of Indus. Relations, *Laws that Prohibit Retaliation and Discrimination*, *available at* http://www.dir.ca.gov/dlse/HowToFileLinkCodeSections.htm. California has strong statutory protection for whistleblowers. *See* Cal. Lab. Code §§ 1101 and 1102. The MAA defeats the purposes of those statutes that allow groups to bring claims forward to vindicate the public purpose animating those provisions.

The MAA is invalid because it prohibits the exercise of these state law rights, which serve an important public purpose. The burden is on Hobby Lobby to prove that the MAA does not interfere with other non-preempted state laws.

3. The Arbitration Agreement Unlawfully Prohibits Group Claims That Are Not Class Actions, Representative Actions, Collective Actions Or Other Procedural Devices Available In Court Or Other *Fora*

The cases focus on the rights of employees to use collective procedures in courts and other adjudicatory *fora*. Employees have the right to bring their collective disputes together as a group, or an individual can represent others to bring a group complaint. The MAA prohibits such group claims or consolidation.[10]

This is an essential point, which responds to the repeated dissents of Board members and the holdings of the courts. They opine that class and collective actions are created by court rules and that Section 7 cannot override those procedural and substantive creations of courts. Where these claims are brought by two or more employees, there is no need to invoke class action, collective action or any procedural format. It is just two or more employees bringing the same claim and assisting each other. Alternatively, it can be two or more employees bringing a

[10] As to this theory, this avoids the argument that employees do not have the right to invoke the formalized procedures available in court such as class actions or collective actions.

complaint that would require the participation of other employees and would affect them such as a necessary party. Such group claims stand apart from class actions, collective actions and representative actions that invoke court adopted procedures.[11]

4. The Arbitration Agreement Is Invalid And Interferes With Section 7 Rights To Resolve Disputes By Concerted Activity of Boycotts, Banners, Strikes, Walkouts And Other Activities

The arbitration procedure is invalid because it makes it clear that the employees are limited to the MAA procedure to resolve disputes. It applies to all disputes, not just disputes that could be brought in a court or before any agency. It governs "any dispute, demand, claim, controversy … with or against Company … that in any way arises out of, involves, or relates to Employee's employment … ." (J.A. 108, 168.) This would foreclose the employees from engaging in strikes or boycotting activity, expressive activity or other public pressure campaigns. This is a yellow dog contract prohibited by the Norris-LaGuardia Act, 29 U.S.C. § 102. Here, employees are forced to agree that they shall use only the arbitration procedure to resolve disputes with Hobby Lobby, and thus they would be violating the arbitration procedure if they were to use another, more effective, forum, such as a public protest or a strike. Any employee who violates this rule would be subject to discipline just as he/she would be for violating any other employer rule.

This is an illegal forced waiver of the Section 7 right to engage in lawful economic activity, including boycotting, picketing, striking, leafleting, bannering and other expressive activity. That concerted activity could also include seeking a Union's assistance in negotiating a better arbitration provision or in invoking the Arbitration Agreement. The Board's recognition that the FAA is an unlawful yellow dog contract under the Norris-LaGuardia Act reaffirms that but does not go far enough. If the Arbitration Agreement is unlawful under the Norris-LaGuardia Act

[11] Since the truck drivers are not covered by the FAA, they would have the right to engage in activity with other employees.

and Section 7, it is unlawful because it prohibits other concerted means of resolving disputes. Employees are not limited to bringing claims concertedly before courts or agencies;[12] they can do so by direct action.

F. THE ARBITRATION PROCEDURE IS UNLAWFUL BECAUSE HOBBY LOBBY MAINTAINS OTHER UNLAWFUL PROVISIONS IN THE EMPLOYER HANDBOOK THAT GOVERN THE ARBITRATION PROCEDURE

1. The MAA Is a Company Policy, and Those Policies Govern the MAA; Those Policies, Which Are Unlawful, Render the MAA Unlawful

The arbitration agreement is in the same handbook that contains these unlawful rules.[13] (J.A. 108–09, 168–69.) The handbook renders the arbitration agreement unlawful because they restrict the use of it by employees. The handbook provides in bold: "**Any employee who violates this Employee Conduct Policy, or any other Company policy, procedure, practice, or rule may, in the sole discretion of management, be subject to disciplinary action, up to and including termination of employment.**" (J.A. 83, 141.) Hobby Lobby has since acknowledged the invalidity of many of these rules and has signed a settlement agreement with the NLRB rescinding these rules. *See* Req. for Judicial Notice filed concurrently.

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[12] Surely, every employer would rather force employees to resolve disputes in the least friendly *fora*: the courts and arbitration. The Norris-LaGuardia Act and the NLRA protect the right of employees to settle disputes in the most effective manner, which is collective action in the workplace. *See On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (2015).

[13] Hobby Lobby relies on handbook statements to explain and modify the MAA. For example, the handbooks refer to the MAA and expressly modify or clarify the MAA. (J.A. 66, 125-26) This applies to the rules discussed above. The handbooks are also inconsistent with the MAA. For example, the handbooks refer to settling "legal disputes." The MAA has no such limitation and includes "any demand, claim, controversy."

2. The MAA Is Unlawful Because It Is Confidential, and Workers Cannot Disclose the Proceedings

The arbitration procedure is unlawful because the Employee Handbook contains an unlawful confidentiality provision. That unlawful confidentiality provision is entitled "Confidentiality Policy," and it appears in the handbooks. (J.A. 84, 142.) Because that policy would apply to proceedings brought under the arbitration procedure, the arbitration procedure is unlawful. The confidentiality provision, for example, encompasses "[c]onfidential data about employees, including employee pay rates and performance evaluations." (J.A. 84, 142.) It also extends to information "that if disclosed, could adversely affect the Company's business." (J.A. 84, 142.) Claims or adverse decisions under the MAA could adversely affect the Company's business.

It would prohibit employees from disclosing collective action under the MAA or would prohibit one employee who invoked the MAA from disclosing the outcome. It would prevent one employee from disclosing a favorable decision, which another employee could use.[14]

It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the NLRA. *MCPc, Inc.*, 360 NLRB No. 39 (2014); *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *see also Scientific-Atlanta, Inc.*, 278 NLRB 622, 624–25 (1966).

For the reasons addressed above, the confidentiality provision in the employee handbooks[15] and the American Arbitration Association rules renders the MAA unlawful.

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[14] This forecloses the use of issue or claim preclusion against Hobby Lobby.

[15] *See, e.g.*, *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal.App.4th 74, 79, 89 (2014) (confidentiality clause that is one sided renders arbitration agreement substantively unconscionable).

3. The Solicitation Policy Renders the MAA Unlawful

The solicitation policy in the handbooks is unlawful. (*See* J.A. 85, 143.) Employees may not "solicit for any other cause during work time." (J.A. 85, 143.) This would prohibit employees from soliciting other employees to help them in any claim that they might bring under the MAA. The policy would furthermore prohibit employees from retaining documents in their possession to support their claims. Finally, the policy prohibits employees from distributing "literature or printed material of any kind in work areas at any time." (J.A. 85, 143.) This would prevent them from soliciting or seeking printed material in support of claims or even copies of the Employee Handbook. Although Hobby Lobby could investigate, seek witnesses and documents, employees could not do the same to advance their claims through the MAA.

4. The Loitering Policy Interferes With the MAA

The loitering policy in the handbooks prohibits employees from remaining in parking lots in order to solicit assistance to bring claims. (J.A. 85, 143.) This affects the ability of employees to bring claims collectively or jointly under the MAA.

5. The Email Usage Policy Interferes With the MAA

The email usage policy in the handbooks prohibits employees from sending "unsolicited email messages." (J.A. 89, 149.) This prohibits employees from sending emails to other employees about claims. They could not seek information or witnesses to support their claims. This interferes with Section 7 rights of employees to resolve claims under the MAA.

6. The Computer Usage Policy Interferes With the MAA

The computer usage policy in the handbooks interferes with the MAA because "email may not be used to solicit donations or support on behalf of individuals or organizations." (J.A. 87–88, 147–48.) This violates *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), and interferes with the MAA.

Employees would be prohibited from soliciting support for individual claims or any group claims brought under the MAA. *Cf. Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014) (the solidarity principle allows employees to ask another employee for support).

7. The MAA Is Unlawful Because It Is a Company Policy and Is Enforceable By Way of Discipline

The MAA is contained within the Employee Handbook. It is thus a policy maintained by the Respondent. The Respondent makes it plain that any conduct "inconsistent with any of the Company's policies … may … be subject to disciplin[e]." (*See* J.A. 82–83, 140–41.)

Because Hobby Lobby makes it clear that it will discipline employees for acts that violate the Company's policies, employees are subject to discipline if they file charges with the Labor Board or file claims of any kind, including class or collective or concerted claims.

The Board assumes that employers will enforce company policies and rules by way of discipline. Thus, the maintenance of those rules is unlawful because of the threat of discipline. No employer maintains rules and announces to employees it will not enforce rules by way of discipline. Here, Hobby Lobby makes it explicit that employees may be disciplined for violation of these rules.

8. The MAA Contains a Penalty Provision For Excercising Section 7 Rights

The MAA provides:

> Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

(J.A. 109, 169.) This penalizes workers who may institute any action in court. This penalizes employees additionally because of the threat of a damage award. This chills employees who may want to exercise their Section 7 rights to bring a court action.

9. The Handbook Contains a "Free Peek" Provision, Which Gives An Unfair Advantage To the Employer and Interferes With the Section 7 Rights of Employees

The handbooks provide for an "Open Door Policy." (J.A. 65, 124–25.) It immediately precedes the MAA. It states, "If an employee has any problem relating to his/her job, the employee should promptly and frankly discuss it with his/her supervisor." (J.A. 65, 124.) This gives Hobby Lobby an unfair "free peek" at employee disputes. Such free looks are considered substantively unconscionable.[16] The MAA also contains a "free peek" provision that is mandatory: "Prior to submitting a Dispute to arbitration, the aggrieved party shall first attempt to resolve the Dispute by notifying the other party in writing of the Dispute." (J.A. 108, 168.) These provisions interfere with Section 7 rights for employees who want to refrain from presenting their dispute to management until arbitration.

10. The MAA Is Only In English and Thus Deprives the Employees of Their Section 7 Rights To Read, Understand and Discuss Collectively The MAA and the Applicable Provisions In the Handbook

Employees have the fundamental right to discuss their terms and conditions of employment. This necessarily includes understanding those terms. Hobby Lobby has presented no evidence that it provides the MAA or the handbook in any language other than English. More than just interfering with Section 7 rights, it prevents Section 7 rights by keeping the MAA secret by having it and the handbooks in an incomprehensible format.[17]

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[16] *Carmona*, 226 Cal.App.4th at 89.

[17] This renders it procedurally unconscionable. *Carmona*, 226 Cal.App.4th at 85.

11. Summary

There are a number of provisions in the employee handbooks that undermine, interfere with and restrict the right of employees to bring claims collectively or even individually, and they render the MAA unlawful.

G. THE MAA IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS

1. The MAA Is Unlawful Because It Imposes Additional Costs On Employees To Bring Employment Related Disputes

The MAA increases the costs of employees who bring claims concerning working conditions. They cannot share expert witness fees, deposition costs, copying costs, attorney's fees and many other costs associated with bringing and pursuing claims. Bringing them as a group includes sharing those costs. Sharing costs is concerted activity. Thus, the MAA expressly penalizes workers by increasing their costs in violation of Section 7.

2. The MAA Is Unlawful Because It Would Prohibit an Employee of Another Employer From Assisting a Hobby Lobby Employee or Joining With a Hobby Lobby Employee To Bring a Claim

Separately, an employee of any other employer is also an employee within the meaning of the NLRA. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Such other employee could assist an employee of Hobby Lobby or join with a claim brought by a Hobby Lobby employee.[18] The rights of all other employees of other employers are violated by the MAA independently of whether it violates just the Section 7 rights of Hobby Lobby employees. The MAA cannot apply to an employee of another employer, nor can it prohibit a Hobby Lobby employee from joining with an employee of another employer.

Furthermore, it would prohibit employees of Hobby Lobby from bringing group complaints with employees of "affiliates, subsidiaries, officers, directors, agents, attorneys, representatives, and/or other employees" described in the MAA

[18] The ALJ did not address this issue.

even though those "affiliates, subsidiaries, officers, directors, agents, attorneys, representatives, and/or other employees" are not parties to the MAA.[19] (J.A. 108, 168.)

Here, moreover, it discourages union activity where the employees have selected a union as their representative but are precluded from engaging the union to pursue group claims on their behalf. It would prohibit a union that represents employees from bringing any claim on behalf of represented employees.

3. The MAA Is Unlawful and Interferes With Section 7 Rights Because It Applies To Parties Who Are Not the Employer But May Be Agents of the Employer or Employers of Other Employees Under The Act

The MAA is invalid because it applies to other employers. The MAA extends to disputes with the Company, its "affiliates, subsidiaries, officers, directors, agents, attorneys, representatives, and/or other employees." (J.A. 108, 168.) None of the other named parties is bound to arbitrate claims against the employee except the Company itself. The MAA does not bind the " affiliates, subsidiaries, officers, directors, agents, attorneys, representatives and/or other employees" affiliated with the employer and so on. Each of these persons could be an employer or joint employer within the meaning of the Act. Yet, the employee is bound to arbitrate claims against those individuals where those claims arise out of wages, hours and working conditions to the extent they are the employer.[20]

There are many wage and hour statutes that can impose joint liability. Thus, the MAA prohibits Section 7 activity against parties who are not the employer and thus is overbroad and invalid. This would affect the employees' right to bring

[19] This conduct is inherently destructive of Section 7 rights because it limits Section 7 activity on its face without a business justification. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

[20] *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

claims against joint employer relationships. *See Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015).

4. The MAA Is Unlawful and Interferes With Section 7 Rights Because It Restricts the Right of Workers To Act Together To Defend Claims By the Employer Against Them

Employees have the right to band together to defend against claims made by the Employer or other employees. Although an employee might choose to refrain from concerted activity against the employer, that employee may wish to engage in joint activity where there are joint or related claims against several employees. Under the MAA, they could not jointly defend themselves but would have to defend themselves individually in separate actions. There may be cross-claims, counter-claims or claims for indemnification. The MAA is facially invalid since it prohibits group action to defend against claims jointly.[21]

5. The MAA Is Unlawful Under The Norris-LaGuardia Act

The Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq*., states that, as a matter of public policy, employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of ... representatives [of their own choosing] or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102. The act declares that any "undertaking or promise in conflict with the public policy declared in section 102 … shall not be enforceable in any court of the United States … ." 29 U.S.C. § 103. The MAA plainly interferes with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed by the Norris-LaGuardia Act. This argument is fully explored in the law review article written by Professor Matthew Finkin, *The Meaning and Contemporary Vitality of the Norris-*

[21] For example, employees would have to hire lawyers who would cost more for individual representation. Employees could not share the costs of expert witnesses, document production, depositions, etc. The simple fact that individual actions increase the costs on the workers makes it a penalty and violates Section 7.

LaGuardia Act, 93 Neb L. Rev 1 (2014). He forcefully argues that an agreement to waive collective actions is a quintessential yellow dog contract prohibited by the Norris-LaGuardia Act. The ALJ agreed. We repeat this here to reinforce our arguments. *See Epic Systems Corp.*, 823 F.3d 1147.

H. THE BOARD IMPROPERLY APPROVED THE JOINT MOTION OF THE GENERAL COUNSEL AND THE RESPONDENT TO SUBMIT THIS MATTER ON A STIPULATED RECORD

The Committee objected to the submission of this case on the stipulated record. (J.A. 226–31.) The ALJ overruled those objections. (J.A. 232–35.) The Objections were offers of proof. The Committee sought to prove many facts that were related to the Section 7 issues in this case. The following are some examples:

The Committee offered to prove that the brand of religion espoused by Hobby Lobby and its owners has a core tenet of concerted protected activity. That is, the religion encourages its members and adherents to engage in helping workers improve their wages, hours and working conditions through concerted activity.

The Committee offered to prove that Hobby Lobby, on many occasions, has encouraged employees to work with other employees to resolve workplace issues. The employees have been counseled that working together to resolve these problems is a religious belief and tenet.

The Committee offered to prove that the same is true of many other religions.

The Committee offered to prove that, as part of these core tenets, religions teach that employees should work together to assist each other to improve their working conditions, including working conditions that affect each other.

The Committee offered to prove that these are core tenets of religions of employees of Hobby Lobby and employees of other employers. Further, the Committee offered to prove that employees of Hobby Lobby and other employers hold these views as sincere religious beliefs.

The Committee offered to prove that the arbitration procedure contained in Hobby Lobby's policies, either using the American Arbitration Association or the Christian Conciliation, is a process that is time consuming, expensive and inefficient. The procedures do not serve the purposes of the FAA and also interfere with effective vindication of Section 7 rights. *See* Robert Gorman & Matthew Finkin, *Labor Law Analysis and Advocacy*, Chapter 8.2 (JURIS 2013) (explaining the right of employer to limit Section 7 activity depends on legitimate business justification).

The Committee offered to prove that Hobby Lobby has disciplined many employees for violations of company policies. Thus, employees would reasonably understand that a violation of the MAA could lead to discipline.

The Committee offered to prove the Rules of the American Arbitration Association require confidentiality, which interferes with the Section 7 rights of employees to disclose the proceedings. The Rules of the Christian Conciliation encourage application of religious principles, which include the religious principle of employees helping other employees solve workplace disputes.

I. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO THE CORE RELIGIOUS ACTIVITY OF HELPING OTHER WORKERS, AND THE FAA, NLRA AND NORRIS-LAGUARDIA ACT HAVE TO BE APPLIED TO PROTECT THIS RELIGIOUS RIGHT

Section 7 protects the right of employees to engage in concerted protected activity which extends to asking for help in work place issues from other employees. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12. Such concerted activity is a central principle of religion, including the brand of religion that Hobby Lobby professes in the work place. Protected concerted activity for mutual aid and protection is core religious activity.

In 1993, Congress enacted the RFRA. 42 U.S.C. §§ 2000bb–2000bb-4. It was enacted in response to a Supreme Court decision, *Employment Division v. Smith*, 494 U.S. 872 (1990), which many saw as restricting the exercise of religion.

The Act in relevant part provides:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1.

The RFRA came boldly to the attention of the public in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). Hobby Lobby operates according to "Christian" principles.

> Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so.

Burwell, 134 S.Ct. at 2766 (citations omitted).

Moreover, the Court noted:

> Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens [owners of Hobby Lobby] and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so – in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees.

Id. at 2776.

The statement of purpose described above comes directly from the Employee Handbook. (*See* J.A. 59, 118.)[22] The Supreme Court in *Burwell* held that the application of a portion of the Affordable Care Act imposes substantial burden on the religious beliefs of the owners of Hobby Lobby. It did so because there was a regulation requiring that contraceptives be provided over the religious objections of the owners. The Court held that this "contraceptive mandate imposes a substantial burden on the exercise of religion … ." *Burwell*, 134 S.Ct. at 2779.

The Court then went on to state:

> The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Id. at 2754.

To the extent that the FAA enforces a prohibition against collective activity, it not only burdens but prohibits such collective activity, which is a core religious

[22] Mardell, Inc., a subsidiary, has a more pronounced religious function because Mardell operates "Christian and educational supply stores in numerous states." (J.A. 118.)

activity. Here, there is clear tension: the right to help the fellow worker protected by the NLRA and the Norris LaGuardia Act against the limitation imposed by the FAA. The RFRA teaches that the FAA must give way to the religious right to help fellow workers.

Nor is there any governmental interest. The NLRA and Norris-LaGuardia Act defeat the argument that there is any governmental interest in forbidding or burdening group action because they serve to protect such activity.

Finally, the application of the FAA does not reflect a "least restrictive" means of accomplishing any compelling governmental interest in preserving and protecting arbitration in general.

> The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§ 2000bb–1(a), (b) (requiring the Government to "demonstrat[e] that application of [a substantial] burden to *the person* … is the least restrictive means of furthering [a] compelling governmental interest").

Burwell, 134 S.Ct. at 2780 (alteration in original) (citation omitted).

The FAA could easily be applied to contracts in commercial regimes but not in application to concerted claims in arbitration by employees governed by the NLRA. Carving out this exception, which is limited, would be the "least restrictive" means of achieving the goals of the FAA without interfering with the religious rights of employees. Thus, the FAA would apply in the *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), context because no employee religious rights were at issue.

Hobby Lobby, in its handbook asserts that the workplace is one where employees, including workers, must operate the business and act in the manner consistent with their religion:

> In order to effectively serve our owners, employees and customers, the Company is committed to:
>
> - Honoring the Lord and all we do by operating the Company in a manner consistent with Biblical principals [sic];
>
> - Serving our employees and their families by establishing a work environment and Company policies which build character, strengthen individuals, and nurture families; and
>
> - Providing a return on the owners' investment, sharing the Lord's blessings with employees, and investing in our community.
>
> We believe that it is by God's grace and provision that the Company has endured. He has been faithful in the past, and we trust Him for our future.

(J.A. 59, 118.)

The question then is whether, when workers get together to benefit themselves in the workplace, is this a religious exercise? That question is easily answered in the affirmative.

Religions are replete with references to the workplace. The religious exercise to help fellow workers is a fundamental tenet of every religion. Whether we use the phrase "brotherly love" or otherwise, every religion encourages workers to help each other to make themselves and the workplace better.[23] The central religious act of helping other workers is a core principle of Christianity, which seems to govern the principles by which Hobby Lobby operates.

Hobby Lobby brought its lawsuit to challenge a portion of the Affordable Care

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[23] This is just a religious version of the solidarity principle explained by the Board in *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12. This is the application of the most fundamental religious principle: the Golden Rule. *See* Wikipedia, *Golden Rule*, *at* https://en.wikipedia.org/wiki/Golden_Rule. If some fellow employees ask for help regarding a workplace issue, the other employee should help the first.

Act because it claimed that statute burdened its religious exercise. The Court found, against the government's arguments, that the Affordable Care Act imposed a substantial burden on religious activity and found that the government could not establish that it imposed the least restrictive means of establishing any governmental interest.

There are three federal laws at issue:

- The National Labor Relations Act
- The Norris-LaGuardia Act
- The FAA

The RFRA applies to supersede any governmental restriction on the free exercise of such religious activity. To the extent that those laws are interpreted in any way to burden the religious exercise of helping fellow workers, the RFRA requires that super strict scrutiny be applied.

Here, the NLRA governs the right of employees to engage in concerted activities. It is nothing more than workers getting together to help themselves and their families. Thus, there is nothing inconsistent with the application of Section 7, and any limitation on the scope of Section 7 would be contrary to the religious views of those who want to help fellow workers.

Hobby Lobby uses as an alternative arbitration process, the Christian Conciliation's rule of Procedure for Christian Conciliation. Nothing in its rules prohibits group or collective or class resolution of disputes. Hobby Lobby's prohibition in its MAA is thus contrary to the very religious organizations' procedures that it adopts. It is also doubtful that, in light of the RFRA, the Board can invalidate the Christian Conciliation's religious form of arbitration. And this is

particularly true since there is a deep tradition of religious arbitration.[24] The fact that the very religious-based procedure that Hobby Lobby uses allows group complaints undermines the application of the FAA to prohibit such collective disputes from being resolved.

There is no doubt that the FAA, if applied to foreclose concerted activity, would substantially burden the exercise of religion by those employees who wanted to work together to help their brothers and sisters in the workplace. It would also burden those employees of other employers.

The burden shifts at that point under the RFRA for the government to establish that that substantial burden "is in the furtherance of compelling government interest." Here, there is no governmental interest. The government can simply allow, consistent with the government interest of the National Labor Relations Act and the Norris-LaGuardia Act, employees to present their claims concertedly in some forum. Nothing in this case requires that that forum be arbitration. That forum can be arbitration or in court. This is the central thrust of *Murphy Oil USA, Inc.* What an employer cannot do, consistent with the NLRA, the Norris-LaGuardia Act and the RFRA, is entirely foreclose workers working together to make their workplace a better circumstance.

The religious exemption principles that we derive from the RFRA are already in place and have been long recognized for those who have some religious objection to joining or supporting a union. *See* 29 U.S.C. § 159. There are some religions that have the basic tenet that adherents should not join or support unions. Title 7 also recognizes that an accommodation is sometimes necessary. *See EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990) (holding that because employee's religious objection was to union itself, reasonable accommodation was required, allowing him

[24] *See* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 Yale L.J. 2994, 3014 (2015) ("The paradigmatic example of this counter-narrative is religious arbitration … .").

to make charitable donation equivalent to amount of union dues, instead of paying dues). *Reed v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers*, 569 F.3d 576, 577 (6th Cir. 2009). Religious principles often govern and require an accommodation. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015).

The NLRB has expressly recognized that the RFRA does apply to the NLRA. *Carroll Coll., Inc.*, 345 NLRB 254, 257 (2005) (finding compelling governmental interest in ordering employer to bargain to overcome RFRA argument), *bargaining order issued*, 350 NLRB No. 30 (2007), *and enforcement denied*, 558 F.3d 568 (D.C. Cir. 2009) (holding that constitutional doctrine prohibits Board's assertion of jurisdiction). *See* David B. Schwartz, *The NLRA's Religious Exemption in A Post-Hobby Lobby World: Current Status, Future Difficulties, and A Proposed Solution*, 30 ABA J. Lab. & Emp. L. 227 (2015), and Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, 96 B.U. L. Rev. 109 (2016). This case establishes that the RFRA does apply to the NLRA. However, no case deals with Section 7 rights of employees.

For these reasons discussed above, the RFRA applies, and the FAA cannot be applied to interfere with the religious right of employees to help other employees by prohibiting employees from jointly working together to improve the workplace and to help fellow workers with respect to wages, hours and working conditions.[25]

VI. THE REMEDY IS INADEQUATE

The Board's notice and the Decision of the Board should be mailed to all employees. The Board only requires that Hobby Lobby "[n]otify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised … ." (App. 6.) This notification without further explanation of what occurred in the proceedings is not adequate

[25] The Court must address the application of the RFRA because it contains a statutory fee requirement. The Committee is entitled to its fees if it prevails on this ground.

notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Hobby Lobby should be required to toll the statute of limitations for any claims for the period during which the MAA has been in place until a reasonable time after employees received the notice so that they may assert any collective or group claims that they have. Otherwise, the Employer would have had the advantage of forestalling and foreclosing group claims. This would give employees an opportunity to learn that the MAA has been rescinded and that they may bring group or collective claims.

The Board erroneously excused Hobby Lobby's successful effort to gain dismissal of two class actions. (*See* App. 6 n.4.) Hobby Lobby should be required to allow those class actions to be reinstated with the tolling of the statute of limitations. "Equitable tolling, a long-established feature of American jurisprudence derived from 'the old chancery rule' … ." *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224, 1232 (2014). To the extent that the laws are state law rights, state law would generally govern. California has a generous equitable tolling doctrine. *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 194 P.3d 1026 (Cal. 2008). There are similar doctrines in all states where Hobby Lobby has facilities. Here, tolling is particularly appropriate because employees were prohibited from bringing any collective or group actions. In order to remedy this unlawful restriction, the statute of limitations under any federal or state law should be tolled.[26] This Court should remand to the Board to either grant the tolling remedy or explain why such a remedy is inappropriate. *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 445 (7th Cir. 1993) (holding remand appropriate where remedy is questioned).

[26] This would include any unfair labor practices, which would be filed with the Board.

VII. CONCLUSION

For the reasons suggested above, this Court should affirm the Board's finding that the MAA violates Section 7. It should, however, find first that the FAA does not apply. Should, however, the Supreme Court reverse this Court's decision in *Epic Systems Corp.*, this Court should either address or require the Board to address the other issues raised in this brief that would invalidate the MAA, irrespective of the FAA.

Dated: December 20, 2016

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD

Attorneys for COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

141398\891138

CERTIFICATE OF COMPLIANCE

Pursuant to Seventh Circuit Rule 32(b), I certify that the attached OPENING BRIEF OF PETITIONER, INTEVENING RESPONDENT AND INTERVENING PETITIONER, COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE is proportionately spaced, has a typeface of 12 points or more, and contains 13,601 words.

Dated: December 20, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

Attorneys for COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

CASE NO. 16-2297 [Consolidated with 16-3162 and 16-3271]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Petitioner, No. 16-2297 v. NATIONAL LABOR RELATIONS BOARD, Respondent, and HOBBY LOBBY STORES, INC., Intervening Respondent.	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745
HOBBY LOBBY STORES, INC., Petitioner, No. 16-3162 v. COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Intervening Respondent, and NATIONAL LABOR RELATIONS BOARD, Respondent.	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745

NATIONAL LABOR RELATIONS BOARD, Petitioner, No. 16-3271 v. HOBBY LOBBY STORES, INC., Respondent, and COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Intervening Petitioner,	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745

APPEAL OF DECISIONS OF NATIONAL LABOR RELATIONS BOARD
363 N.L.R.B. No. 195, 20-CA-139745

REQUIRED SHORT APPENDIX TO OPENING BRIEF OF PETITIONER AND INTERVENING RESPONDENT AND INTERVENING PETITIONER, COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

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Statement of Counsel Pursuant To Circuit Rule 30(c)

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STATEMENT OF COUNSEL PURSUANT TO CIRCUIT RULE 30(c)

The undersigned counsel for Petitioner, Intervening Respondent and Intervening Petitioner, Committee To Preserve the Religious Right To Organize, hereby states that all of the materials required by Circuit Rule 30(a) are included in the Appendix to this brief. The materials required by Circuit Rule 30(b) are included in the Joint Appendix filed by Intervening Respondent, Petitioner and Respondent, Hobby Lobby Stores, Inc.

Dated: December 20, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

Attorneys for COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

HOBBY LOBBY STORES, INC.

and **Case 20-CA-139745**

THE COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

ORDER GRANTING GENERAL COUNSEL AND RESPONDENT'S JOINT MOTION TO SUBMIT STIPULATED RECORD TO THE ADMINISTRATIVE LAW JUDGE AND SETTING BRIEFING SCHEDULE

I. ORDER GRANTING JOINT MOTION

On June 2, 2015, the General Counsel and the Respondent submitted a joint motion to submit a stipulated record to the administrative law judge (stipulation and motion). This motion and stipulation included a stipulation of issues presented, signed by Respondent and General Counsel on June 1, and June 2, 2015, respectively, and a submission of joint exhibits and stipulation of facts signed by the Charging Party, Respondent and General Counsel on May 28, May 27, and June 2, 2015, respectively.

On June 3, I issued an order setting a deadline of June 17, 2015, for the Charging Party to file and serve its response to the joint motion and stipulation, including any objections, and setting a deadline of June 24, 2015, for the General Counsel and the Respondent to submit responses. I have received and considered the Charging Party's objections to the proposed stipulated record, the General Counsel and Respondent's respective reply briefs in response to the Charging Party's objections to the proposed stipulated record. For the reasons set forth below, the General Counsel and Respondent's joint motion is here by GRANTED.

Section 10(b) of the National Labor Relations Act (the Act) provides for the issuance of a complaint and notice of hearing based upon a timely filed charge. However, a charging party has no absolute right to an evidentiary hearing under Section 10(b) if there are no material issues of fact to be resolved. *NLRB v. Brush–Moore Newspapers*, 413 F.2d 809, 811 (6th Cir. 1969). Thus, the General Counsel, who has the primary responsibility for prosecuting cases before the NLRB, may enter into stipulations without the charging party's consent subject to the right of a charging party to introduce contrary evidence or adduce additional facts. *B.F. Goodrich*, 113 NLRB 152 (1955), enfd. sub nom, *UAW v. NLRB*, 231 F. 2d 237 (7th Cir. 1956), cert. denied

352 U.S. 908. However, where a charging party objects to a stipulation entered into by the General Counsel, the Board is obliged to set forth "on the record" its reasons for accepting the stipulation notwithstanding the charging party's objections. *Concrete Materials of Georgia v. NLRB*, 440 F.2d 61, 68 (5th Cir. 1971).

The Complaint raises three issues: 1) whether the Respondent's mutual arbitration agreement (MAA) and related policies require employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action in violation of Section 8(a)(1) of the Act; 2) whether employees would reasonably read the MAA to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act; and 3) whether Respondent's enforcement of the MAA through its motions to compel arbitration violates Section 8(a)(1) of the Act.

The Charging Party's first objection asserts that the stipulation erroneously fails to put a comma between "construction" and "warehouse workers." The second objection contends there is inconsistency because different parts of paragraph 4 refer to "team truck drivers" and "truck drivers." The Charging Party fails to assert why these minor discrepancies are material and necessitate a hearing. The stipulated record sets forth these facts in a manner sufficient for me to decide the issues in the case.

The third objection asserts that the stipulation of facts does not contain any information about employee meetings to determine whether remedial notices could be read in these employee meetings. The General Counsel has not requested a notice reading as a remedy in the complaint. The Charging Party may argue for remedies not requested by the General Counsel and I will consider them at the compliance stage if I find merit to the General Counsel's complaint. Such evidence is not, however, relevant to the merits of this case.

The Charging Party's fourth and fifth objections assert that the Charging Party should be permitted to submit evidence that arbitration will not be speedy, efficient, or expeditious. Any decision on the merits of this case, however, will rely on established Board precedent, *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), which the administrative law judge is not empowered to disturb. Any arguments regarding the legal integrity of Board precedent, including the foundations upon which it rests, are properly addressed to the Board. The stipulated record sets forth the relevant facts in a manner sufficient for adjudication under existing Board precedent.

The Charging Party's sixth objection concerns whether the process of dispute resolution affects interstate commerce. The Charging Party and the Respondent admit that the National Labor Relations Board has jurisdiction with respect to commerce. See Stipulation of Fact, p. 5, paragraph 3; Charging Party's Objections to Proposed Stipulated Record, p. 2, Objection #6; and Respondent's Answer to Amended Complaint, p. 2, paragraph 3.

The remainder of the objections, 7-13, relate to collective action and religion, and are outside the scope of the General Counsel's complaint.

For the foregoing reasons, I GRANT the joint motion of General Counsel and Respondent to hear this case on stipulation, and approve the Stipulation they submitted.[1]

II. ORDER SETTING BRIEFING SCHEDULE

Briefs in this matter will be due on August 3, 2015. See Section 102.111 of the Board's Rules and Regulations, governing the timeliness of briefs.

SO ORDERED this 29th day of June, 2015.

Eleanor Laws
Administrative Law Judge

Service via fax & email:

For the NLRB Region 20

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For the Charging Party

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[1] For this reason, I do not find relevant the documents the Charging Party requested in it subpoena duces tecum to the Respondent. I will address this fully in my decision. Nothing precludes the Charging Party from making an offer of proof and providing supporting argument in his brief.

JOB #116

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	6/29	15:47	914153565156	EC--S	00' 53"	003	OK
002		15:49	912124922501	EC--S	00' 40"	003	OK
003		15:50	915103371023	EC--S	00' 35"	003	OK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

HOBBY LOBBY STORES, INC.

and **Case 20-CA-139745**

THE COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

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Section 10(b) of the National Labor Relations Act (the Act) provides for the issuance of a complaint and notice of hearing based upon a timely filed charge. However, a charging party has no absolute right to an evidentiary hearing under Section 10(b) if there are no material issues of fact to be resolved. *NLRB v. Brush–Moore Newspapers*, 413 F.2d 809, 811 (6th Cir. 1969). Thus, the General Counsel, who has the primary responsibility for prosecuting cases before the NLRB, may enter into stipulations without the charging party's consent subject to the right of a charging party to introduce contrary evidence or adduce additional facts. *B.F. Goodrich*, 113 NLRB 152 (1955), enfd. sub nom, *UAW v. NLRB*, 231 F. 2d 237 (7th Cir. 1956), cert. denied

Hobby Lobby Stores, Inc. *and* The Committee to Preserve the Religious Right to Organize. Case 20–CA–139745

May 18, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On September 8, 2015, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel and the Charging Party each filed cross exceptions and a supporting brief. The Respondent filed answering briefs, and the General Counsel and the Charging Party filed reply briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d. 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found that maintaining the arbitration agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

The Board has considered the decision and the record in light of the exceptions and briefs,[2] and we affirm the judge's rulings, findings and conclusions,[3] and adopt the recommended Order as modified and set forth in full below.[4]

---

[1] In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Charging Party filed a postbrief letter calling the Board's attention to recent case authority.

On January 29, 2016, the Charging Party filed a "motion to allow oral argument and suggestion for public notice." The Respondent's exceptions also requested oral argument. We deny the Charging Party's motion, and the Respondent's request, as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] We find no merit in the Charging Party's cross-exceptions, which raise substantive arguments that are wholly outside the scope of the General Counsel's complaint. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. *Kimtruss Corp.*, 305 NLRB 710 (1991). Likewise, we reject the Charging Party's argument that the judge improperly approved the joint motion of the General Counsel and the Respondent for her to resolve the case on a stipulated record. The stipulated record includes sufficient evidence to evaluate the complaint, and the additional evidence that the Charging Party sought to introduce exceeded the scope of the General Counsel's theory.

[3] In adopting the judge's conclusions that the Respondent violated Sec. 8(a)(1) by maintaining and enforcing its Agreement, we do not rely on her findings that: (1) the burden was on the Respondent to show that its Agreement was subject to the Federal Arbitration Act (FAA); (2) the Respondent failed to show that its Agreement affected commerce within the meaning of the FAA; and (3) the Respondent's team truckdrivers were exempt from the FAA. We may assume for purposes of this case that the FAA is applicable because, consistent with our decisions in *D. R. Horton* and *Murphy Oil*, supra, "[f]inding a mandatory arbitration agreement unlawful under the National Labor Relations Act, insofar as it precludes employees from bringing joint, class, or collective workplace claims in any forum, does not conflict with the Federal Arbitration Act or undermine its policies." *Murphy Oil*, 361 NLRB 72, slip op. at 6, citing *D. R. Horton*, supra, 357 NLRB at 2283–2288.

To the extent the Respondent argues that plaintiffs Fardig and Ortiz were not engaged in concerted activity in filing their class action wage and hour lawsuits in the United States District Court for the Central District of California and the Eastern District of California, respectively, we reject that argument. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, supra, 357 NLRB at 2279.

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's arbitration Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

We also reject the position of our dissenting colleague that the Respondent's motions to compel arbitration were protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. at 747, the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts that have the illegal

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3: "3. The Respondent violated Section 8(a)(1) when it enforced the MAA by asserting the MAA in litigation that Plaintiffs Fardig and Ortiz brought against the Respondent."

ORDER

The National Labor Relations Board orders that the Respondent, Hobby Lobby Stores, Inc., Oklahoma City, Oklahoma, with a place of business in Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) In the manner set forth in the remedy section of the judge's decision, reimburse Maribel Ortiz and any other plaintiffs in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.) and Jeremy Fardig and any other plaintiffs in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.) for reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motions to dismiss the collective lawsuits and compel individual arbitration.

(d) Within 14 days after service by the Region, post at all facilities in California the attached notice marked "Appendix A," and at all other facilities employing covered employees, copies of the attached notice marked "Appendix B."[5] Copies of the notices, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2014, and any former employees against whom the Respondent has enforced its mandatory arbitration agreement since April 28, 2014. If the Re-

objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision (such as the Respondent's motions to compel arbitration in the underlying wage and hour lawsuits here), even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

Finally, we disagree with our dissenting colleague's conclusion that the Respondent's Agreement does not unlawfully interfere with employees' right to file unfair labor practice charges with the Board. We note that our colleague repeats an argument previously made, that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims if the agreement reserves to employees the right to file charges with the Board. As explained in *Ralphs Grocery*, 363 NLRB No. 128, slip op. at 3, that argument is at odds with well-established Board law.

[4] We reject the Charging Party's request that we impose additional remedies on the Respondent, as the Charging Party has not shown that the remedies set forth in *D. R. Horton* and *Murphy Oil* are insufficient to remedy the Respondent's violations.

We have amended the judge's conclusions of law to reflect that fact that Plaintiffs Fardig and Ortiz, and not the Charging Party, filed the lawsuits against the Respondent; and we have corrected the Order to reflect the appropriate regional office and to conform to the Board's standard remedial language. Because the courts granted the Respondent's motions to compel individual arbitration and the lawsuits are no longer pending, we find it unnecessary to order the Respondent, as in *Murphy Oil* (slip op. at 21–22), to remedy the Sec. 8(a)(1) enforcement violation by notifying the court that it no longer opposes the lawsuits filed by Plaintiffs Fardig and Ortiz. We have also substituted the attached notices for those of the administrative law judge.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since April 28, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 18, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Mutual Arbitration Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Maribel Ortiz, Jeremy Fardig, and other employees each signed the Agreement. Later, Ortiz filed a lawsuit against the Respondent in federal court asserting class and representative claims for violations of federal and state wage and hour laws. In reliance on the Agreement, the Respondent filed a motion to compel individual arbitration, which the court granted. Fardig and other employees also filed a class action lawsuit against the Respondent in federal court alleging violations of wage and hour laws. Again relying on the Agreement, the Respondent filed a motion to compel individual arbitration, which the court granted. My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1] I also dissent from my colleagues' finding that the Agreement interferes with the right of employees to file charges with the Board.

1. *The "Class Action" Waiver.* I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, above, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file motions in federal court seeking to enforce the Agreement. It is relevant that the federal courts that had jurisdiction over the non-NLRA claims *granted* the Respondent's motions to compel arbitration. That the Respondent's motions were reasonably based is also supported by court decisions that have enforced similar agreements.[7] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[8] I also believe that any Board finding of a violation based on the Respondent's meritorious federal court motions to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I do not believe the Board can properly require the Respondent to reimburse Ortiz, Fardig, or any other plaintiffs for their attorneys' fees and litigation expenses in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

2. *Interference with NLRB Charge Filing.* I disagree with the judge's finding and my colleagues' conclusion that the Agreement violates Section 8(a)(1) by interfering with NLRB charge filing. The Agreement requires arbitration of all employment-related disputes, including those arising under the NLRA,[9] but expressly states that employees "are not giving up any substantive rights under federal, state, or municipal law (*including the right to file claims with federal*, state, or municipal *government agencies*)" (emphasis added). The judge found that although the Agreement does not preclude filing a charge with an administrative agency, the Agreement is unlawful because it requires arbitration of employment-related claims covered by the Act. However, for the reasons stated in my separate opinion in *Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. The Agreement preserves this right.

[5] The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[6] Because my colleagues do not rely on the judge's findings regarding the FAA's application to the Agreement, I do not address them either. However, I disagree with my colleagues' assertion that, assuming the FAA applies here, finding an arbitration agreement that contains a class-action waiver unlawful under the NLRA does not conflict with the FAA. For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that arbitration agreements be enforced according to their terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[7] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

[8] *Murphy Oil, Inc., USA v. NLRB*, 808 F.3d at 1021.

[9] The Agreement requires that "any dispute, demand, claim, controversy, cause of action or suit . . . that in any way arises out of, involves, or relates to Employee's employment . . . shall be submitted to and settled by final and binding arbitration." The only claims to which the Agreement does not apply are "claims for benefits under unemployment compensation laws or workers' compensation laws."

Accordingly, I respectfully dissent.
Dated, Washington, D.C. May 18, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL reimburse Maribel Ortiz, Jeremy Fardig, and any other plaintiffs for reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motions to dismiss their collective wage claims and compel individual arbitration.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

HOBBY LOBBY STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/20–CA–139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Yasmin Macariola, Esq., for the General Counsel.
Frank Birchfield, Esq., and *Christopher C. Murray, Esq.*, for the Respondent.
David Rosenfeld, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts I approved on June 29, 2015. The charge in this proceeding was filed by the Committee to Preserve the Religious Right to Organize (the Charging Party) on October 28, 2014, and a copy was served by regular mail on Respondent, on October 29, 2014. The General Counsel issued the original complaint on January 28, 2015, and an amended complaint on April 9, 2015. Hobby Lobby, Inc. (the Respondent or Company) filed timely answers denying all material allegations and setting forth defenses.

On June 2, 2015, the General Counsel and the Respondent filed a joint motion to submit a stipulated record to the Administrative Law Judge (Joint Motion). The Charging Party did not join the Joint Motion. On June 3, I issued an order granting the Charging Party until June 17, to file a response to the Joint Motions, including any objections to it. On June 17, the Charging Party filed objections to the Joint Motion, and the General Counsel and the Respondent, replied to the objections, respectively, on June 23 and 24. I issued an order granting the Joint Motion over the Charging Party's objections on June 29.[1]

The following issues are presented:

1. Whether the Respondent's Mandatory Arbitration Agreement (MAA) and related policies maintained by the Respondent, which requires employees, as a condition of employment, to waive their right to resolution of employment- related disputes by collective or class action violates Section 8(a)(1) of the National Labor Relations Act (the Act).
2. Whether the MAA maintained by the Respondent would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act.
3. Whether the Respondent's enforcement of the MAA through its motions to compel arbitration in *Jeremy Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVS-AN, U.S.D.C., Central District of California; and *Ortiz v. Hobby Lobby Stores*, Inc., 2:13-cv-01619-TLN-DAD, U.S.D.C., Eastern District Court of California, violates Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Oklahoma corporation with several stores throughout the State of California, including one in Sacramento, California, has been engaged in business as a retailer specializing in arts, crafts, hobbies, home decor, holiday, and seasonal products. The parties admit, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. FACTS

The Respondent, Hobby Lobby, is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products. It operates approximately 660 stores in 47 states.

The Respondent employs individuals in various job titles including but not limited to the following: office clericals; security staff; cashiers; stockers; floral designers; picture framers; media buyers; craft designers; graphic & web designers; production artists; video tutorial hosts; leave assistants; production quality and compliance assistants; construction warehouse workers; customer service representatives; industrial engineers; inventory control specialists; maintenance technicians; pack-

[1] The June 3, 2015, order is hereby admitted into the record as administrative law judge (ALJ) Exh. 1, the Charging Party's June 17 response is admitted as ALJ Exh. 2, the General Counsel's June 23 reply is admitted as ALJ Exh. 3, and the Respondent's June 24 reply is admitted as ALJ Exh. 4. The following abbreviations are used for citations in this decision: "Jt. Mot." for the General Counsel and Respondent's joint motion; "Jt. Exh." for the exhibits attached to the joint motion; "GC Br." for the General Counsel's brief; "R Br." for the Respondents' brief; and "CP Br." for the Charging Party's brief. Although I have included several citations to the record to highlight particular exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

ers/order pullers; photo editors; truck-trailer technicians; truck-trailer technician trainees; social media writers; sales and use tax accountants; and team truck drivers who transport Respondent's products across state lines. (Jt. Mot. ¶ 4(a) & ¶ 4(b).)

Upon commencing employment, all employees receive a copy of the Respondent's employee handbook. There are two different versions of the employee handbook—one for employees in California and one for employees outside of California. Employees must sign in receipt of the handbook and agree to be bound by its terms. The version applicable to employees in California states[2]:

> By my signature below, I acknowledge that I have received a copy of the Company's California Employee Handbook ("Employee Handbook"). I understand this Employee Handbook contains important information on the Company's policies, procedures, and rules. It also contains my obligations as an employee.
>
> I understand that this Employee Handbook replaces and supersedes any and all previous employee handbooks that I may have received, or agreements or promises made by any representative of the Company other than a Corporate Officer prior to the date of my signature below, and that I cannot rely upon any promises or representations made to me by anyone concerning the terms and conditions of my employment that are contrary to or inconsistent with this Employee Handbook, or any subsequent written modifications or revisions to this Employee Handbook posted on the Company's Employee Information Boards.
>
> I understand that my employment with the Company is conditioned upon the contents of this Employee Handbook. I further understand that, with the exception of the Submission of Disputes to Binding Arbitration section of this Employee Handbook and the Mutual Arbitration Agreement, the Company may alter, change, amend, rescind, or add to any policies, procedures, or rules set forth in this Employee Handbook from time to time with or without prior notice. I further understand that the Company will notify me of any material changes to this Employee Handbook, and that, by continuing employment after being so notified of such changes, I acknowledge, accept, and agree to such changes as a condition of my employment and continued employment.
>
> I understand that the employment relationship between me and the Company is at-will. I am employed on an at-will basis, as are all Company employees, and nothing to the contrary stated anywhere in this Employee Handbook or by any Company representative changes my or any employee's at-will status. I am free to resign at any time, for any reason, with or without notice. Similarly, the Company is free to terminate my employment at any time, for any reason, or for no reason at all. I also understand that nothing in this Employee Handbook is to be construed as creating, whether by implication or otherwise, any legal or contractual obligations or restrictions upon the Company's ability to terminate me as an employee at-will, for any reason at any time. Further, no person, other than a Corporate Officer of the Company, may enter into any written agreement amending this atwill employment policy or otherwise alter the at-will employment status of any employee.
>
> By my signature below, I acknowledge that I have read and understand the provisions of this Employee Handbook and agree to abide by all Company policies, procedures, practices, and rules.

Since at least April 28, 2014, the Respondent has maintained the MAA in its employee handbook. The MAA requires employees to waive resolution of employment-related disputes by class, representative or collective action or other otherwise jointly with any other person. Since at least April 28, 2014, the Respondent has required all of its employees to enter into the MAA in order to obtain and maintain employment with the Respondent. (Jt. Mot. ¶ 4(e) & ¶ 4(i).)

The MAA provides, in relevant part:

> This Mutual Arbitration Agreement ("Agreement"), by and between the undersigned employee ("Employee") and the Company, is made in consideration for the continued at-will employment of Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company 's mutual agreement to arbitrate as provided in this Agreement. Employee and Company hereby agree that any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have, at any time following the acceptance and execution of this Agreement, with or against Company, its affiliates, subsidiaries, officers, directors, agents, attorneys, representatives, and/or other employees, that in any way arises out of, involves, or relates to Employee's employment with Company or the separation of Employee's employment with Company (including without limitation, all Disputes involving wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute in tort or contract), shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed. Such arbitration shall be conducted pursuant to the American Arbitration Association's National Rules for the Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation, then in effect, before an arbitrator licensed to practice law in the state in which Employee is or was employed and who is experienced with employment law. . . . The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party. Prior to sub-

[2] The acknowledgment of the handbook does not materially differ for employees outside of California for purposes of this decision.

mitting a Dispute to arbitration, the aggrieved party shall first attempt to resolve the Dispute by notifying the other party in writing of the Dispute. If the other party does not respond to and resolve the Dispute within 10 days of receipt of the written notification, the aggrieved party then may proceed to arbitration. The parties agree that the decision of the arbitrator shall be final and binding. Judgment on any award rendered by an arbitrator may be entered and enforced in any court having jurisdiction thereof.

This Agreement between Employee and Company to arbitrate all employment-related Disputes includes, but is not limited to, all Disputes under or involving Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Fair Credit Act, the Employee Retirement Income Security Act, and all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract. This Agreement shall not apply to claims for benefits under unemployment compensation laws or workers' compensation laws.

By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state, or municipal law (including the right to file claims with federal, state; or municipal government agencies). Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court. Company shall bear the administrative costs and fees assessed by the arbitration provider selected by Employee: either the American Arbitration Association or the Institute for Christian Conciliation. Company shall be solely responsible for paying the arbitrator's fee. Except for those Disputes involving statutory rights under which the applicable statute may provide for an award of costs and attorney's fees, each party to the arbitration shall be solely responsible for its own costs and attorney's fees, if any, relating to any Dispute and/or arbitration. Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

Every individual who works for Company must have signed and returned to his/her supervisor this Agreement to be eligible for employment and continued employment with Company. Further, Employee's employment or continued employment will evidence Employee's acceptance of this Agreement. Employee acknowledges and agrees that Company is engaged in transactions involving interstate commerce, that this Agreement evidences a transaction involving commerce, and that this Agreement is subject to the Federal Arbitration Act. If any specific provision of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain binding and enforceable. This Agreement constitutes the entire mutual agreement to arbitrate between Employee and Company and supersedes any and all prior or contemporaneous oral or written agreements or understandings regarding the arbitration of employment-related Disputes. This Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status.

Employee and Company acknowledge that they have read this Mutual Arbitration Agreement, are giving up any right they might have at any point to sue each other, are waiving any right to a jury trial, and are knowingly and voluntarily consenting to all terms and conditions set forth in this Agreement.

(Jt. Exhs. I. J.) The MAA is also part of the application for employment with the Respondent. (Jt. Exhs. K, L.) It has its own signature requirement. The signed MAA is included in each new employee's "new employee packet" and is filed in the employee's personnel file. (Jt. Exhs. M–X.) During the period of December 18, 2010 to December 18, 2014, Respondent hired approximately 65,880 employees and re-hired approximately 6,324 employees for a total of approximately 72,204 recipients of the MAA. (Jt. Mot. ¶ 4(h).)

On December 3, 2013, the Respondent filed a motion in the United States District Court for the Eastern District of California to dismiss individual and representative wage-related claims a former employee had filed against it under California law, in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.). (Jt. Exh. Y; Jt. Mot. ¶ 5.) The Respondent moved, in the alternative, pursuant to the Federal Arbitration Act (FAA), to compel individual arbitration of plaintiff's claims under the MAA the plaintiff had signed when she began her employment. (Jt. Exh. Y.)

On April 17, 2014, the Respondent filed a motion seeking to dismiss a putative class action lawsuit filed by multiple employees alleging wage and hour claims against it under California law in *Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVSAN (C.D. Cal.). (Jt. Exh. Z; Jt. Mot. ¶ 5.) In the alternative, pursuant to FAA, the Respondent moved to compel individual arbitration under the MAAs signed by each named plaintiff. (Joint Ex. 2Z.) On June 13, 2014, the U.S. District Court for the Central District of California granted the Respondent's motion to compel individual arbitration under the MAA. *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). The *Fardig* court rejected the plaintiffs' arguments that the MAA was unenforceable under California

law and under the National Labor Relations Act pursuant to the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013).

On October 1, 2014, the U.S. District Court for the Eastern District of California in the *Ortiz* case granted the Respondent's motion to compel individual arbitration under the MAA. *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F.Supp. 3d 1070 (E.D. Cal. 2015). The court considered the Board's decision in *D. R. Horton*, and concluded its reasoning conflicted with the FAA and the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

III. DECISION AND ANALYSIS

A. The MAA's Prohibition on Class and Collective Legal Claims

Complaint paragraphs 4(a), (c), (d), and 5 allege that, at all material times since at least April 28, 2014, the Respondent has maintained the MAA, which requires employees to waive their right to resolution of employment-related disputes by collective or class action, as a condition of employment, in violation of Section 8(a)(1) of the Act.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

1. Application of *D. R. Horton* and *Murphy Oil*

When evaluating whether a rule, including a mandatory arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).[3] See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

Because the MAA explicitly prohibits employees from pursuing employment-related claims on a class or collective basis, I find it violates Section 8(a)(1). The right to pursue concerted legal action, including class complaints, addressing wages, hours, and working conditions falls within Section 7's protections. See, e.g., *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *D. R. Horton*, supra;[4] see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)(Section 7 protects employee efforts seeking "to improve working conditions through resort to administrative and judicial forums; *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942); *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), cert. denied, 438 U.S. 914 (1978). Accordingly, an employer rule or policy that interferes with such actions violates Section 8(a)(1). *D. R. Horton*, supra.; *Murphy Oil*, supra; See also *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015); *PJ Cheese Inc.*, 362 NLRB No. 177 (2015); *Leslie's Pool Mart, Inc.*, 362 NLRB No. 184 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

The Respondent propounds numerous arguments as to why *D. R. Horton* and its progeny should be overturned.[5] (R Br. 6–48.) I am, however, required to follow Board precedent, unless and until it is overruled by the United States Supreme Court.[6] See *Gas Spring Co.*, 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents International Union*, 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960)), enfd. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991). Applying the above-cited Board precedent, I find the MAA violates Section 8(a)(1).

Though the Board has made its ruling on the issue clear, I will address the Respondent's arguments that have not been as fully covered by previous decisions. The Respondent contends that a class action waiver does not abridge employees' right to seek class certification to any greater extent than an employer's filing an opposition to an employee's motion for class certification. Of course it does; the former precludes the right, the latter responds to it. And it is apparent the waiver gives the opposition teeth. The Respondent then adds the element of success to the employer's motion to secure its argument. Success of the employer's motion cannot be presumed, however. The Respondent's argument thus fails.

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[3] The Charging Party argues that *Lutheran Heritage* should be overruled. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board.

[4] The Board in *Murphy Oil* reexamined *D. R. Horton*, and determined that its reasoning and results were correct. *Deference and the Federal Arbitration Act*, 128 Harv. L. Rev. 907 (January 12, 2015), provides a well-reasoned explanation as to why the Board's conclusion that collective and class litigation is protected Section 7 activity should be accorded deference by the courts.

[5] Many of these arguments are in line with the dissents in *D. R. Horton* and *Murphy Oil*. Numerous Board and ALJ decisions have addressed the specific arguments raised by the Respondent and there is nothing I can add in this decision that has not already been addressed repeatedly.

[6] The Respondent contends that, because the Board did not petition for a writ of certiorari to challenge the Fifth Circuit's rejection of the relevant part of *D. R Horton*, and because that decision rests primarily on interpretation of a statute other than the NLRA, I should not be constrained by Board precedent. No authority was cited for this contention, however, and I therefore decline to stray from the Board's established caselaw on this point.

The Respondent also contends that the Board's decisions stand for the proposition that employees have the right to have certification decisions heard on their merits. The Board has made no such holding or suggestion. If, by way of the example cited in the Respondent's brief, the class representative misses a filing deadline, nothing in any of the Board's cases suggests a court must nonetheless decide class certification on the merits.

As to the Respondent's assertion that there is no basis in the NLRA, the Federal Rules, or case law for *D .R. Horton's* presumption that class procedures were created to serve any concerns or purposes under the NLRA, the Board has not relied on such concerns or purposes. Two employees who together file charges with the Equal Employment Opportunity Commission (EEOC) about racial harassment are engaged in concerted activity about their working conditions, though the EEOC's charge processing procedures were certainly not created to serve any concerns or purposes under the NLRA. The EEOC's procedures, like class procedures in court, are one of many avenues available for concerted legal activity, regardless of the purposes those procedures were intended to serve.

The Respondent next appears to be arguing that employees can, albeit in vain, file putative class action lawsuits despite the MAA, suffer no adverse consequences for it, and therefore the MAA does not infringe on their rights. There need not be adverse consequences for non-adherence to the MAA for it to violate the Act. Moreover, the MAA on its face spells out adverse consequences for filing putative class actions. The MAA states, in relevant part:

> Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

Thus, in addition to breaking an agreement with the employer not to sue as an express condition of continued employment, an employee who files a putative class action may be assessed with fees and damages.

The Respondent also contends that the Board in *D. R. Horton* misinterpreted the *Norris-LaGuardia Act* (NGLA) when determining it prohibits the enforcement of agreements like the FAA. The Board recently reaffirmed its position that the FAA must yield to the NLGA, stating

> The Board has previously explained why "even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act . . . indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights." An arbitration agreement between an individual employee and an employer that completely precludes the employee from engaging in concerted legal activity clearly conflicts with the express federal policy declared in the Norris-LaGuardia Act. That conflict in no way depends on whether the agreement is properly characterized as a condition of employment. By its plain terms, the Norris-LaGuardia Act sweepingly condemns "*[a]ny* undertaking or promise . . . in conflict with the public policy declared" in the statute: insuring that the "individual unorganized worker" is "free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection," including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or any state."

On Assignment Staffing Services, supra, slip op. at 10 (Emphasis in original, internal citations and footnotes omitted.)

2. The MAA as an employment contract

The Charging Party also asserts that the FAA does not apply because there is no employment contract, citing to the Supreme Court's decisions in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 113–114 (2001), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006), and *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 277 (1995).[7] The Charging Party points out that the MAA itself states, "[t]his Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status." The employees' at-will status is also set forth in the introductory paragraph of the employee handbook. (Jt. Exh. I p. 5; Jt. Exh. J p. 5.)

The Charging Party notes that the Respondent has not offered evidence or argument that a contract of employment has been created by virtue of the MAA in any of the states where it operates. Resolution of this issue would involve delving into each state's body of contract law.[8] Because it is not required to support my conclusion herein that the MAA violates Section 8(a)(1), I decline to undertake this enormous task, the legal aspects of which none of the parties have addressed in their briefs.

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[7] The Charging Party also asserts that MAA, when coupled with the Respondent's confidentiality policy, solicitation policy, loitering policy, email usage policy, computer usage policy, and/or return of company property policy, provide other bases for finding it unlawful. I agree that these policies, when viewed in conjunction with the MAA, act as further barriers to employees discussing their arbitrations under the MAA and/or garnering support from fellow employees. The complaint, however, does not allege that any policy other than the MAA violates the Act, and therefore my conclusions are limited to the MAA. See *Ponntech Papers*, 263 NLRB 264, 265 (1982); *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

The Charging Party sets forth numerous other arguments, including the FAA's impact on other federal and state statutes, the rights of workers to organize under the Religious Freedom Restoration Act (RFRA), and the effect of the MAA on union representation. I have considered each argument in the Charging Party's brief. Because this case can be decided by applying the Board precedent discussed above, I do not address all of the Charging Party's arguments.

[8] For example, under Minnesota law, the disclaimer language in the MAA may negate the existence of a contract. See *Kulkay v. Allied Central Stores, Inc.*, 398 N.W.2d 573, 578 (Minn.Ct.App.1986). By contrast, in *Circuit City*, the Court of Appeals for the Ninth Circuit determined the dispute resolution agreement at issue, with disclaimer language almost identical to the agreement at issue here, was an "employment contract." *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (1999); See also *Ashbey v. Archstone Property Management, Inc.*, 2015 WL 2193178 (9th Cir. 2015).

3. The MAAs and commerce

The Charging Party argues that there is no evidence the individual MAAs with the Respondent's employees affect commerce, and asserts that the activity of arbitration does not affect interstate commerce. This raises the fundamental question of what, in fact, is the "transaction involving commerce" the MAA evidences to bring it within the FAA's reach?

The FAA, at 9 USC § 2, applies to a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . ." Specifically excluded, however, are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC § 1. The Supreme Court in *Circuit City* interpreted this exclusionary provision, "any other class of workers engaged in foreign or interstate commerce," narrowly, and held it applied only to workers actually working in commercial industries similar to seamen and railroad employees. Relying on *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995),[9] the Court in *Circuit City* interpreted Section 2's inclusion provision, a "contract evidencing a transaction involving commerce," broadly, finding it was not limited to transactions similar to maritime transactions.[10] In line with these interpretations, most contracts of employment fall within the FAA's reach, regardless of whether the employees themselves are involved in any traditionally-defined commercial transactions as part of their work.

In *Allied-Bruce Terminix*, supra, the Supreme Court examined the phrase "evidencing a transaction" involving commerce and determined that "the transaction (that the contract 'evidences') must turn out, *in fact* . . . [to] have involved interstate commerce[.]" (emphasis in original). A prior Supreme Court case, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), that like *Circuit City* and *Allied-Bruce Terminix* interpreted the words "involving commerce" as broadly as the words "affecting commerce,"[11] involved an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of Polygraphic Co.'s Vermont plant. The employment contract at issue contained a provision that in case of any dispute, the parties would submit the matter to arbitration by the American Arbitration Association.

The Supreme Court found the FAA did not apply because the company did not show that the employee, "while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."[12]

[9] The Court in *Allied-Bruce* found that the term "involving" was the same as "affecting" and that the phrase "'affecting commerce' normally signals Congress' intent to exercise its Commerce Clause powers to the full," 513 U.S. at 273–275.

[10] Though I am bound by the majority's decision in *Circuit City*, I find the dissenting opinions, and in particular Justice Souter's explanation of why the Court's "parsimonious construction of § 1 of the . . . FAA . . . is not consistent with its expansive reading of § 2," more sound and compelling. Presumably the result of adherence to precedent, the phrase "contract evidencing a transaction involving commerce" is not seen as a residual phrase following the specific category of maritime transactions in § 2, but the phrase "any other class of workers engaged in foreign or interstate commerce" is seen as a residual phrase following the specific categories of seamen and railroad employees in § 1. This distinction supplied the Court's rationale for applying the maxim *ejusdem generis* to "any other class of workers engaged in foreign or interstate commerce" to support its finding that employment contracts are covered by the FAA. "Maritime transactions" is defined in § 1 by way of listing various transactional contracts, such as charter parties, bills of lading, and agreements relating to supplies and vessels. Applying *ejusdem generis*, the expansive definition given to the phrase "contract evidencing a transaction involving commerce," fails to give independent meaning to the term "maritime transaction."

[11] *Allied-Bruce Terminix*, supra, at 277.

[12] The agreement provided for the employment of Bernhardt as the superintendent of Polygraphic Co.'s lithograph plant in Vermont. Its terms stated:

"Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer.

"Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions.

"It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer.

"The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or it its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations [section 1448 et seq.]. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

"The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action special proceedings or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without

Here, the contract at issue is the MAA.[13] There is no other employment contract implicated in the complaint or the answer.[14] By virtue of the MAA, the employee and employer have transacted an agreement to resolve employment disputes through arbitration. What is analytically more difficult about the MAA and similar agreements, when compared with most contracts, is that the arbitration agreement itself is part of the consideration for the transaction. The agreement here states that the "Mutual Arbitration Agreement . . . is made in consideration for the continued at-will employment of the Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company's mutual agreement to arbitrate as provided in this Agreement."[15] (Jt. Exh. I p. 55; Jt. Exh. J p. 56.) Generally, when a contract is involved, the arbitration agreement is a means to solve a contract dispute, and the terms of the agreement spell out independent consideration. For example, in *Allied-Bruce Terminix*, consideration for the termite bond at issue was money. In *Buckeye Check Cashing*, individuals entered into "various deferred-payment transactions with . . . Buckeye . . . in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge." 546 U.S. at 440. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the arbitration agreement was part of an application to register with the New York Stock Exchange. In none of these cases was the agreement to arbitrate itself consideration in the "contract evidencing a transaction involving commerce."

The MAA's terms, including the "consideration" of the individual arbitral process, are not implicated until there is an employment dispute. In other words, an employment dispute is a condition precedent to performance under the MAA. In typical transactions, a dispute is not necessary for the terms of the agreement to be exercised. For example, in *Buckeye*, the check cashing company provided cash to the individuals as consideration for the individuals signing over their checks and paying a fee. These transactions could play out indefinitely without the arbitration agreement provision ever coming into play. If the individuals in *Buckeye* performed their end of the bargain by turning over their checks and the check cashing company sat idle, a dispute would arise. Conversely, there would be no need for the check cashing company to do anything if the individual never presented it with a check to cash. Not so here, if the employees' work is part of the consideration. At all times prior to the advent of a covered dispute and the invocation of a way to resolve it, the employer is continuing to employ the employee and the employee is continuing to perform work for the employer. Continued employment triggers no duty on the employer or the employee with regard to the MAA.[16] The employee deciding not to continue employment with the Respondent, without more, likewise triggers no duty under the MAA. It is difficult to see, therefore, how continued employment is part of the "transaction" the MAA evidences.

Simply put, the MAA is a contract about how employment disputes will be resolved. The "transactions" evidenced by the MAA are agreements to arbitrate any and all employment disputes. Yes, the MAA is a condition of employment, but its topic is not the work the employees will perform or the conditions under which they will perform it. An employer engaged in interstate commerce could require employees, as a condition of employment, to sign an agreement stating that they will sit with their coworkers for lunchtime on Tuesdays.[17] The topic of this agreement is not the employee's work duties or the employer's business, but rather who the employees will eat lunch with on Tuesdays. It certainly would seem a stretch to find that this agreement would be a "maritime transaction or a contract evidencing a transaction involving commerce."

As noted above, the MAA applies to all employees. As the Charging Party points out, some disputes covered by the MAA with some of these employees would likely affect commerce, and other minor disputes likely would not. Take the example of a security worker who walks a block to work (not across state lines) at the same Hobby Lobby store each day. It is hard to see how an individual arbitration, required by the MAA, about a disagreement over the timing of this security worker's lunch break evidences any transaction involving commerce. The fact that the employer is engaged in interstate commerce does not, in my view, render any individual agreement to arbitrate an employment dispute as a "contract evidencing a transaction involving commerce" because it is not the employer's business of producing and selling goods in interstate commerce comprising the "transaction" evidenced by the MAA. To interpret the FAA this broadly would finally stretch it to its breaking point.[18]

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regard to the jurisdiction in which any action or special proceeding may be instituted." 218 F.2d 948, 949–950 (2d Cir. 1955).

[13] I have not been asked to decide whether the entire employee handbook is a contract, and make no findings on this point.

There is no evidence here of any contract setting forth payment, duties, etc. of the various employees' jobs, as in *Bernhardt*. This renders the interpretation in this decision narrower than in *Bernhardt* because I am not looking at a broader employment contract, with an agreement to arbitrate disputes embedded in it, and whether that contract has been breached based on the terms of that contract. Instead, I am looking at whether any employment dispute covered by the contract, here the MAA, evidences a transaction involving commerce.

[14] It strikes me as peculiar that the contract to arbitrate itself is the contract at issue to determine applicability of the FAA, rather than an external contract or agreement subject to an arbitration provision. In most cases, the arbitration agreement would kick in if there was a dispute as to performance under the terms of the agreement. Here, a dispute regarding performance under the terms of the MAA would concern whether the employee submitted a covered dispute to arbitration in line with the MAA, or breached the agreement by filing a lawsuit in court.

[15] Oddly, by this language the MAA is in part made in consideration for itself.

[16] Moreover, as the Respondent asserts, employees who have filed class and/or collective lawsuits have not been disciplined, much less been terminated.

[17] Of course, there would be a clause stating that any disputes over this policy would be subject to arbitration.

[18] Many of the Supreme Court Justices, for example, believe the FAA was stretched too far when the Court determined it applied to state court claims. *Southland Corp. v. Keating*, 465 U.S. 1 (1984), Justice O'Connor, joined by Justice Rehnquist, dissenting; See also *Allied-Bruce Terminex*, supra., Justice O'Connor concurring ; Justice Scalia dissenting; Justice Thomas, joined by Justice Scalia, dissenting. Others

Even if the "transaction" the MAA contemplates is employment or continued employment under the MAA's terms, the individual agreements do not necessarily "evidence a transaction involving commerce." As in *Bernhardt*, not all of the Respondent's employees, while performing their duties, are "'in' commerce, . . . producing goods for commerce, or . . . engaging in activity that affect[s] commerce . . . ."

Consideration of the Supreme Court's decision in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), does not lead to a different finding. In *Citizen's Bank*, the Court stated, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" 539 U.S. at 56–57, quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, (1948). Citizens Bank and Alafabco, a fabrication and construction company, entered into debt-restructuring agreements that contained an agreement to arbitrate any disputes. The Court rejected the argument that the individual transactions underlying the agreements did not, taken alone, have a "substantial effect on interstate commerce." Id. at 56. First, the Court found that Alafabco engaged in interstate commerce using loans from Citizens Bank that were renegotiated and redocumented in the debt-restructuring agreements. Second, the loans at issue were secured by goods assembled out-of-state. Finally, the Court relied upon the "broad impact of commercial lending on the national economy [and] Congress' power to regulate that activity pursuant to the Commerce Clause." The arbitration agreements between the Respondent and the individual employees in this case do not fall within any of these rationales.

The Charging Party, pointing out that the FAA derives its authority from the Commerce Clause, cites to *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012). *Sebelius* discusses the Commerce Clause in relation to Affordable Healthcare Act's (ACA) provision requiring individuals to buy health insurance, commonly known as the individual mandate. In describing the reach of the Commerce Clause in *Sebelius*, the Court observed, "Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'" The Court determined that the "activity" at issue with regard to the individual mandate was the purchase of healthcare insurance, and that under the Commerce Clause, Congress was not empowered to regulate the failure to engage in this activity. Under this analysis, the "activity" the MAA concerns is resolution of employment disputes. For the reasons described above, this "activity" does not necessarily affect interstate commerce, particularly in cases where no dispute with regard to employment under the MAA ever arises.

Based on the foregoing, I agree with the Charging Party that the Respondent has made no showing that an arbitration agreement between the Respondent and any of its individual employees affects commerce.[19]

4. Team truckdrivers

The Charging Party further argues that team truck drivers who transport the Respondent's products across state lines are a class of workers engaged in interstate commerce, and therefore fall within FAA's exception at 9 U.S.C. § 1. The Court in *Circuit City* held that "Section 1 exempts from the FAA only contracts of employment of transportation workers." The interstate truck drivers are clearly transportation workers, a fact not disputed by the Respondent, and therefore are exempt from the FAA. Requiring the team truck drivers to sign and adhere to the MAA therefore violates the Act, regardless of the Board's decisions in *D. R. Horton* and related cases.

B. Enforcement of the MAA

Complaint paragraphs 4(e) and 5 allege that the Respondent violated Section 8(a)(1) of the Act by enforcing the MAA, as detailed above.

It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Here, it is undisputed that the Respondent enforced the MAA by filing motions to compel individual arbitration in *Fardig* and *Ortiz*, as detailed above. (Jt. Exhs. Y, Z). The Respondent contends that the Board lacks authority to enjoin the Respondent's motions to compel because they are protected by the First Amendment under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction CO. v. NLRB*, 536 U.S. 516 (2002). I find that instant case falls within the exception set forth in Bill Johnson's at footnote 5, which states in relevant part:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enforced

believe it was stretched too far when it was held to apply to employment contracts. *Circuit City*, supra, Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, dissenting; Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissenting.

[19] As the party asserting the FAA as an affirmative defense, the Respondent has the burden of proof to show that the agreements at issue are subject to the FAA. The assertion of the FAA as an affirmative defense requires me to address its reach in this decision. Though, as the Respondent notes, many courts have disagreed with the Board's rationale in *D. R. Horton*, et. al., the precise issue of whether a particular agreement to arbitrate is a "maritime transaction or a contract evidencing a transaction involving commerce" has not been squarely addressed.

> in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), aff'd. 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power preempts the field." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The Board has determined that these exceptions apply in the wake of *Bill Johnson's* and *BE&K Construction*. See, e.g., *Allied Trades Council (Duane Reade Inc.)*, 342 NLRB 1010, 1013, fn. 4 (2004); *Teamsters, Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991). Moreover, particular litigation tactics may fall within the exception even if the entire lawsuit may not be enjoined. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Dilling Mechanical Contractors*, 357 NLRB 544 (2011). As such, since the Board has concluded that agreements such as those comprising the MAA explicitly restrict Section 7 activity, the Respondent's attempt to enforce the MAA in state court by moving to compel arbitration fall within the unlawful objective exception in *Bill Johnson's*. See *Neiman Marcus Group*, supra.

The Respondent argues that numerous courts have found agreements such as the MAA to be lawful and enforceable. While this is true, the Board has held that agreements such as the MAA violate the Act, and the Supreme Court has not ruled otherwise. The Respondent, by its actions in court, is challenging Board case law which very clearly holds the MAA violates the Act. The motion to compel arbitration, which by virtue of the MAA can only be on an individual basis, is the crux of the challenge. Inherent in this challenge are risks, which the Respondent is assuming by declining to follow the Board's case law as it works its way through the system.

C. The MAA and Board Charges

Complaint paragraphs 4(b) and 5 allege that the Respondent violated Section 8(a)(1) by maintaining, at all material times since at least April 28, 2014, which would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.

The *Lutheran Heritage* test set forth above applies to this allegation. I find that employees would reasonably construe the MAA as restricting their access to file charges with the Board.

The MAA is worded very broadly, and explicitly states it applies to "any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have" at any time that that "in any way arises out of, involves, or relates to Employee's employment" with the Respondent. This would certainly encompass an unfair labor practice charge with the Board.

More specifically, the MAA includes disputes involving:

> wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute.

Certainly, disputes about wrongful termination, wages, compensation, and hours could comprise unfair labor practice claims. Discrimination based on Section 7 activity also is encompassed by this language.

The MAA then proceeds to state it applies to disputes under various federal laws, ending with a catchall that it applies to disputes under :

> all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract.

That this would encompass some claims under the NLRA requires no explanation. The only claims explicitly excluded are benefits under unemployment compensation laws or workers' compensation laws.

The Respondent contends that the MAA would not be interpreted to apply to Board charges because of the following language:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies).

The Respondent contends that because of the explicit statement that claims with federal, state, or municipal agencies are excluded from the MAA, any misinterpretation of the MAA would be manifestly unreasonable. I disagree.

To begin with, the MAA specifically states claims of sexual harassment, harassment and/or discrimination based on any class protected by federal law are subject to mandatory individual arbitration. These are all patently clear examples of claims that arise under the civil rights statutes the Equal Employment Opportunity Commission (EEOC) enforces, i.e., Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[20] Yet the MAA also states that nothing would preclude an employee from filing a charge with a federal agency, ostensibly including the EEOC.[21] The only way to reconcile these two provisions is to read the MAA as not precluding filing a charge with an ad-

[20] These statutes are respectively codified at 42 U.S.C. 2000e et seq.; 42 U.S.C. 121-1 et seq; and 20 U.S.C. 633a.

[21] The EEOC's charge-filing process is described at http://eeoc.gov/employees/howtofile.cfm.

ministrative agency, yet in the end those disputes must be resolved only through final and binding arbitration under the MAA rather than through whatever fruits filing a charge or other similar effort may bear. The same rationale holds true for Board proceedings, given that the MAA requires individual arbitration of disputes over "wrongful termination, wages, compensation, work hours." This begs the question: Why would any employee bother to file a charge? A reasonable employee, not versed in how various federal, state, and local agencies process claims, would take it at face value that the topics specifically included as falling within the MAA would be subject to arbitration. This is particularly true given that the MAA explicitly excludes benefits under unemployment compensation laws or workers' compensation laws, but not under the NLRA.

Considering that ambiguities must be construed against the drafter of the MAA, which is the Respondent, I find the MAA violates Section 8(a)(1) because employees would reasonably believe the MAA requires arbitration of employment-related claims covered by the Act. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

CONCLUSIONS OF LAW

(1) The Respondent, Hobby Lobby Stores, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement (MAA) requiring all employment-related disputes to be submitted to individual binding arbitration.

(3) The Respondent violated Section 8(a)(1) of the Act when it enforced the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent.

(4) The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAA is unlawful, the recommended order requires that the Respondent revise or rescind it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board. The Respondent shall notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement. Because the Respondent utilized the MAA on a corporatewide basis, the Respondent shall post a notice at all locations where the MAA, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D. R. Horton*, supra, slip op. at 17; *Murphy Oil*, supra.

I recommend the Respondent be required to notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of *California in Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss these actions and to compel individual arbitration of the claims, and inform the court that it no longer opposes the actions on the basis of the arbitration agreement.

I recommend the Company be required to reimburse employees for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filing its motion to compel arbitrations in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVSAN (C.D. Cal.). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employees shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Hobby Lobby Stores, Inc., Oklahoma City, Oklahoma, with a place of business in Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the mandatory arbitration agreement in any form

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of California in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreement upon which it based its motions to dismiss the class and collective actions and to compel individual arbitration of the employees' claim, and inform the respective courts that it no longer opposes the actions on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse the plaintiffs who filed suit in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's motion to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all facilities in California the attached notice marked "Appendix A," and at all other facilities employing covered employees, copies of the attached notice marked "Appendix B."[23] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2015

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

WE WILL notify the courts in which the employees filed their claims in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to dismiss her collective wage claim and compel individual arbitration, and we will inform the court that we no longer oppose the employees' claims on the basis of that agreement.

WE WILL reimburse the plaintiffs in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective wage claim and compel individual arbitration.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on December 20, 2016, I electronically filed the foregoing **OPENING BRIEF OF PETITIONER, INTEVENING RESPONDENT AND INTERVENING PETITIONER, COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE** with the United States Court of Appeal for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on December 20, 2016.

/s/ *Karen Kempler*
Karen Kempler